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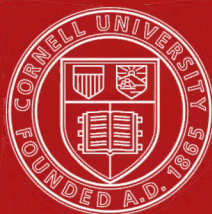
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**A treatise on the law of damages, embrac**



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A TREATISE  
ON THE  
LAW OF DAMAGES

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF  
CONTRACT AND TORT

BY

J. G. SUTHERLAND

AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION"

THIRD EDITION

BY

JOHN R. BERRYMAN

EDITOR OF THE SECOND EDITION OF THIS WORK; AUTHOR OF A  
"DIGEST OF THE LAW OF INSURANCE;" ONE OF THE  
REVISERS AND EDITORS OF THE "WISCONSIN  
STATUTES OF 1898," ETC., ETC.

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## PREFACE TO FIRST EDITION.

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The law of damages is now, and for many years has been, in the course of rapid and expansive growth; its former applications have been subjected to frequent forensic and judicial review, with the advantage of the experience and learning of the past, and the stimulus as well as the suggestive aid of new and diversified interests demanding protection, and new forms of injury, invoking redress.

It is therefore desirable that the law be often rewritten to incorporate in its structure the results of the latest adjudications, not only for the light they reflect upon the earlier cases, but to derive the full benefit of these accretions, which embody the contribution of contemporary jurists and master minds of the profession.

The administration of justice is committed to so many independent tribunals, that it is not surprising their determinations, especially of questions of first impression, have not proceeded in a very harmonious current. Differences of judicial opinion, more or less radical, under such circumstances, are unavoidable. These are liable to result in permanent divergencies; and to beget local exceptions and peculiarities so numerous as to greatly mar the symmetry and impair the authority of our general jurisprudence.

Frequent elementary expositions of the law, embracing a discussion of the discordant cases with reference to the general principles which all acknowledge, are of great importance; for, to the extent that they are influential, they will counteract this centrifugal tendency.

It is believed that the work now offered will be found useful in these respects, notwithstanding that excellent works on the same subject are now in general use. It has extended to three volumes by being made to embrace a wide range of

topics germane to the general subject, and by an elementary and a minutely practical treatment of them.

The First Part is elementary, and designed to aid the inquiries of the student, and to facilitate the investigations of the practitioner. In it are stated and illustrated the general principles upon which damages, recognized under various names, are allowed by law; their scope relatively to the injury to be redressed; the principles by which the elements of damage may be tested, and the amount to be allowed therefor determined; by which facts may be legitimately weighed to enhance or mitigate damages; how they may be juridically or conventionally liquidated and satisfied; and the pleadings, evidence and procedure suitable and necessary for their recovery.

The Second Part contains a particular discussion of these principles in their practical application to the subjects of contract and tort, which give rise to actual demands for damages.

The whole is copiously elucidated by decided cases and apposite quotations; and the supporting authorities will, it is believed, be found to embrace all the decisions of any importance on the subject.

The author submits his work with its faults—for he dare not hope it will be found faultless—to the indulgent judgment and fair criticism of the profession.

J. G. S.

SALT LAKE CITY, September, 1882.

## PREFACE TO SECOND EDITION.

---

A new edition of this work has been deemed necessary to incorporate into it the results of the numerous adjudications during the ten years which have elapsed since the publication of the first edition. A thorough revision has been made, and about four hundred pages of new matter added as the fruit of nearly seven thousand later decisions. By a judicious condensation of the old matter and the exclusion of some redundancies, the additions have not so materially increased the size of the volumes as to make them inconveniently large. The text has been divided into sections for easier reference; but the side-paging will serve to direct the reader to the matter indicated in the frequent references in judicial opinions and by text-writers and practitioners to the first edition.

The editors submit their work to the profession with the assurance that they have spared no pains to make it comprehensive and accurate.

J. G. S.

J. R. B.

NOVEMBER, 1892.

## PREFACE TO THIRD EDITION.

---

This edition of Judge Sutherland's treatise on the Law of Damages has been prepared with the view of making it expressive of the law of that subject as it is at the present time. This has not been done at the expense of the excellent perspective that distinguished writer gave of the subject in the first edition. That part of the work remains undisturbed. The editor has sought to do for this edition what he endeavored to do, under the direction of the author, in preparing the second edition: incorporate into it the results of the numerous adjudications on the various branches of the law of damages made during the eleven years which have elapsed since the publication of that edition. That endeavor met the approval of the author, who desired that this edition should be prepared by the editor of the second edition. The very numerous references in the reported cases and treatises on various branches of the law to that edition tend to show that it has been found useful to the bench and bar. The controlling aim in the preparation of this edition has been to make it as advantageous as possible in presenting the American and English law of damages as it has been declared by the courts.

The American cases which have been reported in unofficial series of reports are referred to therein. These references and the new matter added to the text and notes represent about eight hundred pages. To make room for so much additional matter, it has been found necessary to condense somewhat a portion of the matter which appeared in the former edition. It is hoped that this has been done without serious detriment to the value of the work.

MADISON, WIS., August, 1903.

JOHN R. BERRYMAN.

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# THE LAW OF DAMAGES.

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## PART I.

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### AN ELEMENTARY EXPOSITION OF THE SUBJECT.

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#### CHAPTER I.

##### A GENERAL STATEMENT OF THE RIGHT TO DAMAGES, THEIR LEGAL QUALITY AND KINDS.

- § 1. General observations.
- 2. The right to damages; how amount ascertained.
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- 4. Public wrongs.
- 5. Illegal transactions.
- 6. Contractual exemption from liability for damages.
- 7. Nature of the right to damages; its survival.
- 8. Injuries to unborn child.

§ 1. General observations. The chief practical value of any system of law is in its adaptability and efficiency to secure the individual in the full enjoyment of his rights, and in giving him adequate relief when they are violated. The common law defines these rights, and professes to afford a remedy for their every infraction. In the nature of things, this remedy cannot consist in so annulling, by adjudication, an act which violates a right that the injured party will be restored to its enjoyment as though there had been no interruption.

The consequences of an act which is an invasion of another's right may be arrested; in some cases partial restoration is practicable. But unless compensation can be made as a substitute for that to which a party is entitled, and of which he has been more or less deprived, there will be an irreparable

injury, and a corresponding failure of justice. This compensation the law provides for; and it is the principal object of legal actions to ascertain what it should be, fix the amount, and enforce its payment. In some actions the paramount purpose is to compel the defendant to yield up possession of specific property which the plaintiff claims to own, and incidentally to obtain compensation for its detention, as in ejectment and replevin. So in actions on contracts for the direct payment of money, the effect of recovery is apparently to compel the defendant to do the very thing he agreed to do; [2] compensation for the delay in the form of interest is a subordinate matter.<sup>1</sup>

§ 2. **The right to damages; how amount ascertained.** In contemplation of law, every infraction of a legal right causes injury; this is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damage inevitably follows.<sup>2</sup> This deduction is made though it actually appears and is recognized in the case that there

<sup>1</sup> Radloff v. Haase, 196 Ill. 365, 63 N. E. Rep. 729, citing this section.

<sup>2</sup> Radloff v. Haase, 196 Ill. 365, 63 N. E. Rep. 739; Hahn v. Cotton, 136 Mo. 216, 37 S. W. Rep. 919; Watson v. New Milford Water Co., 71 Conn. 442, 42 Atl. Rep. 265; Board of Water Commissioners v. Perry, 69 Conn. 461, 37 Atl. Rep. 1059; Quillen v. Betts, 1 Pennewill, 53, 39 Atl. Rep. 595; Ross v. Louisville, etc. Co., 70 Miss. 725, 12 So. Rep. 825; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. Rep. 84, 28 Am. St. 575; Green Bay & M. Canal Co. v. Kaukauna Water Power Co., 112 Wis. 323, 87 N. W. Rep. 864. See §§ 9, 10.

It is not a sufficient objection to the recovery of damages that the action brought for that purpose is without precedent. It was long since determined that a special action on the case was introduced because the law will not suffer an injury and damage without affording a remedy. Winsmore v. Greenbank, Willes, 577, 580.

One who is induced by falsehood and fraud to marry a woman who is pregnant by the man who is guilty thereof may recover from him the damage sustained. Kujek v. Goldman, 150 N. Y. 176, 44 N. E. Rep. 773, 55 Am. St. 670, 34 L. R. A. 156.

One who, notwithstanding the husband's protests, persists in selling a wife drugs knowing that she uses them constantly and that their use is destructive to her mental and physical faculties, and causes her husband the loss of her companionship and services, is liable to him. Holleman v. Harward, 119 N. C. 150, 25 S. E. Rep. 972, 56 Am. St. 672, 34 L. R. A. 803. See as to the right of action in favor of a widow for the mutilation of the body of her deceased husband, Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471; Larson v. Chase, 47 Minn. 307, 50 N. W. Rep. 238, 28 Am. St. 370, 14 L. R. A. 85.

was in fact no injury, but a benefit conferred.<sup>1</sup> This legal conclusion of damage is generally indeterminate as to amount; it is that *some* damage resulted; if no proof is made of the actual damage, judgment can be given only for a minimum sum — nominal damages. In cases of contract it may occur that for any breach a large and determinate sum will become due, for which judgment without proof may be rendered. But generally, within certain limits, the actual injury is to be established by proof as matter of fact. In many cases of tort, however, the injury complained of is of such a nature that compensation cannot be awarded by any precise pecuniary standard, and there is no legal measure of damages, because the injury does not consist of pecuniary elements, or elements of which the value can be measured or expressed in money. The compensation which shall be allowed for an injury of this character is by the common law referred to the sound discretion and dispassionate judgment of a jury. Where there is a legal measure of damages the jury must determine the amount as a fact according to that measure, otherwise the law which measures the compensation would be of no avail; and whether they have done so or not in a given case may be proximately seen by a comparison of the verdict with the evidence.<sup>2</sup> Courts of general jurisdiction have power over verdicts, and may set them aside when the jury have been influenced by passion or corruption, or have disregarded the legal measure of compensa-

<sup>1</sup> *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Roberts v. Glass*, 112 Ga. 456, 37 S. E. Rep. 704; *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. Rep. 693. Compare *Bossu v. New Orleans, etc. R. Co.*, 49 La. Ann. 1593, 22 So. Rep. 809.

<sup>2</sup> *Parke v. Frank*, 75 Cal. 364, 17 Pac. Rep. 427, citing the text.

In the exercise of its police power the state may fix a minimum sum as compensatory and exemplary damages for the violation of a statute. *Cramer v. Danielson*, 99 Mich. 531, 58 N. W. Rep. 476. And may provide that the damages found by a jury shall be doubled by the court. *Fye v. Chapin*, 121 Mich. 675, 80 N. W.

Rep. 797; *Cummings v. Riley*, 52 N. H. 368; *Chickering v. Lord*, 67 id. 555, 32 Atl. Rep. 773; *Fitzgerald v. Dobson*, 78 Me. 559, 7 Atl. Rep. 704; *Barrett v. Malden & M. R. Co.*, 3 Allen, 101; *Hoole v. Dorroh*, 75 Miss. 257, 22 So. Rep. 829; *Kingsbury v. Missouri, etc. R. Co.*, 156 Mo. 379, 57 S. W. Rep. 547; *Carter v. Current River R. Co.*, 156 Mo. 635, 57 S. W. Rep. 738. *Contra*, *Atchison & N. R. Co. v. Baty*, 6 Neb. 37; *Grand Island, etc. R. Co. v. Swinbank*, 51 Neb. 521, 71 N. W. Rep. 48, the court being influenced, to some extent, because exemplary damages are not recoverable under the local law.

tion. By the course of the current of modern decisions, whether compensation for the actual injury in actions for torts is subject to legal measure or not, if the injury was done maliciously, fraudulently, oppressively or with wanton violence, such measure, if any, while not entirely ignored, ceases to be the limit of recovery. The jury are at liberty, in the exercise of their [3] judgment, on finding such malice or other aggravation, to give additional damages as a *solatium* to the party so wronged, and as a punishment to the wrong-doer. The sums so allowed by law and found by a jury for tortious injuries, or losses from breach of contract, are *damages* — the pecuniary redress which a successful plaintiff obtains by legal action. They are for the most part compensation for civil injury — exemplary damages being an exception; therefore, the law relating to the subject of damages is principally directed to defining and measuring compensation.<sup>1</sup> The civil injury for which damages may be recovered must be one which is recognized as such by the law; it must result from the violation in some form of a legal right. No damages can be recovered for failure to fulfill a merely moral obligation, nor for any wrong or injury which consists in a neglect of social amenities.

§ 3. *Damnum absque injuria; injuria sine damno.* The right to damages constituting a legal cause of action requires the concurrence of two things: that the party claiming them has suffered an injury, and that there is some other person who is legally answerable for having caused it. If one suffers an injury for which no one is liable it gives no legal claim for damages: it is *damnum absque injuria*; so if one does a wrong from which no legal injury ensues, there is no legal cause of action: it is *injuria sine damno*.<sup>2</sup> That no act char-

<sup>1</sup> The term "compensatory damages" covers all loss recoverable as matter of right; it is synonymous with "actual damages." Pecuniary loss is an actual damage; so is bodily pain and suffering. *Gatzow v. Buening*, 106 Wis. 1, 19, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. 17.

<sup>2</sup> *McAllister v. Clement*, 75 Cal. 182, 16 Pac. Rep. 775; *Wittich v. First Nat. Bank*, 20 Fla. 843, 51 Am. Rep. 631.

Acts done with reasonable care pursuant to valid statutes will not render those who perform them liable for damages resulting. *Highway Com'rs v. Ely*, 54 Mich. 173, 19 N. W. Rep. 940; *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. Rep. 767, 24 L. R. A. 671; *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276, 44 Atl. Rep. 229, 609; *Transportation Co. v. Chicago*, 99 U. S. 635, 640; *Rowe v. Granite Bridge Co.*, 21 Pick.

acterized by these negations is actionable is, in the abstract, a truism. When we say that a person who suffers an injury which does not arise from any other person's fault has no cause of action, a self-evident proposition is stated; and equally so when we say that no person has a cause of action against another for the latter's wrongful act unless he is injured by it. The former precludes any action for lawful acts lawfully done, though some actual hurt or loss results to some person therefrom.<sup>1</sup> Thus, for example, adjoining land-owners have a mutual right of lateral support to the soil in its natural state, but not under the pressure of buildings, unless a prescriptive right to the support thereof has been acquired.<sup>2</sup> When one has so loaded down his soil near the line, the other still has the right to make any use he pleases of his premises, and may excavate to the line, if he does so with due care, upon proper notice to the other; and if by such excavation the stability of the buildings [4] of the adjoining proprietor is endangered, or they are in fact destroyed, it is an injury for which no action lies.<sup>3</sup> The exercise of one's right to dig in his own land may have the effect of diverting an underground stream of water which is beneficial to another, or of draining his well, but the act of digging which causes either result, not being wrongful even though done with malice, there is no redress for the injury.<sup>4</sup> This

344; *Darlington v. Mayor*, 31 N. Y. 164; *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670.

<sup>1</sup> *Id.*; *De Baker v. Southern California R. Co.*, 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. 237; *Friend v. United States*, 30 Ct. of Cls. 94, 107.

<sup>2</sup> *A'Beckett v. Warburton*, 14 Vict. L. R. 308.

<sup>3</sup> *Bass v. West*, 110 Ga. 698, 36 S. E. Rep. 244; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937; *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489, 49 N. E. Rep. 296; *Ulrick v. Dakota Loan & Trust Co.*, 2 S. D. 285, 49 N. W. Rep. 1054; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327; *Wyatt v. Harrison*, 3 B. & Ad. 875; *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92,

8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *McGuire v. Grant*, 25 N. J. L. 356; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Winn v. Abeles*, 35 Kan. 91, 10 Pac. Rep. 443; *White v. Nassau Trust Co.*, 168 N. Y. 149, 61 N. E. Rep. 1135.

<sup>4</sup> *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. of L. Cas. 349, 2 H. & N. 168; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175; *Greenleaf v. Francois*, 18 Pick. 117; *Trustees, etc. v. Youmans*, 50 Barb. 316; *Ellis v. Duncan*, 11 How. Pr. 515; *Lybe's Appeal*, 106 Pa. 626; *Mayor, etc. of Bradford v. Pickles*, [1895] App. Cas. 587. See, on the question of motive, *Fisher v. Feige*, 137 Cal. 39, 59 L. R. A. 333, 59 Pac. Rep. 618.

principle has limitations. Where a municipal corporation by the operation of a water system, consisting of wells and pumps on its own land, taps the subsurface water stored in the land of an adjacent owner and in all the contiguous territory, and leads it to its own land, and by merchandizing it prevents its return, whereby the land of such owner is impaired for agricultural purposes, he may recover for the wrong done.<sup>1</sup>

Where the civil law is not in force or its analogies have not been followed, surface water is regarded as a common enemy, and every landed proprietor has the right to take all necessary steps to protect his land from its effects, though in doing so the water is cast upon the land of a coterminous proprietor to his injury.<sup>2</sup> Mr. Gould says this rule prevails in England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Minnesota, Wisconsin, Nebraska, Washington, New Mexico, and Texas.<sup>3</sup> By the civil law interference with the natural flow of surface water is a nuisance, for which nominal damages may be recovered without proof of actual damages. The courts of Pennsylvania, Illinois, North Carolina, Alabama, Kentucky, Tennessee, California and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri.<sup>4</sup>

The owner of property may thus and otherwise, whilst in the reasonable exercise of established rights, casually cause an injury which the law regards as a misfortune merely, and for which the party from whose act it proceeds is liable neither at law nor in the forum of conscience. No legal liability is incurred by the natural and lawful use of his land by the owner thereof in the absence of malice or negligence.<sup>5</sup> Thus one

<sup>1</sup> *Forbell v. New York*, 164 N. Y. 278; *O'Connor v. Fond du Lac, etc. R. Co.*, 52 Wis. 526, 9 N. W. Rep. 287; 58 N. E. Rep. 644, affirming 47 App. Div. 371, 61 N. Y. Supp. 1005; *Willis v. Perry*, 92 Iowa, 297, 60 N. W. Rep. 727, 26 L. R. A. 124.

<sup>2</sup> *Edwards v. Charlotte, etc. R. Co.*, 39 S. C. 472, 18 S. E. Rep. 58, 22 L. R. A. 246; *Morrissey v. Chicago, etc. R. Co.*, 38 Neb. 406, 430, 56 N. W. Rep. 946; *Rowe v. St. Paul, etc. R. Co.*, 41 Minn. 384, 43 N. W. Rep. 76; *Cairo, etc. R. Co. v. Stevens*, 73 Ind.

<sup>3</sup> *Gould on Waters* (3d ed.), § 265.

<sup>4</sup> *Id.*, § 266. See *Pfeiffer v. Brown*, 165 Pa. 267, 30 Atl. Rep. 844, 44 Am. St. 598.

<sup>5</sup> *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445; *Long v. Elberton*, 109 Ga. 28, 34 S. E. Rep. 333, 41 Am. St. 454, 46 L. R. A.



opening a coal mine in the ordinary and usual manner may, upon his own land, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situate, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.<sup>1</sup> In cases of this nature a loss or damage is indeed sustained, but it results from an act, which is neither unjust nor illegal, done by another free and responsible being.<sup>2</sup> The prosecution in good faith of a groundless action may give the defendant great annoyance, and cause him loss of time and money; but the plaintiff in such case is exercising a legal right, and the defendant, according to the weight of authority, if there has been no interference with his person or property, is entitled to no compensation for the injury he suffers beyond the costs which may be taxed in his favor.<sup>3</sup> Every man is entitled to come into a court of justice and claim what he deems to be his right; if he fails he shall be amerced (according to the old principle) for his false claim; and the defendant is entitled to his costs, and with these he must be content.<sup>4</sup> But if the suit be malicious, as well as false or groundless,

428; *Barnard v. Sherley*, 135 Ind. 547, 34 N. E. Rep. 600, 35 id. 117, 24 L. R. A. 568, 575, 151 Ind. 160, 47 N. E. Rep. 671.

<sup>1</sup> *Pennsylvania Coal Co. v. Sander-son*, *supra*. This case has been considered in *Robb v. Carnegie*, 145 Pa. 324, 22 Atl. Rep. 649, 27 Am. St. 694, 14 L. R. A. 329; *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. 717, 23 Atl. Rep. 219, and in *Drake v. Lady Ensley Coal, Iron & R. Co.*, 102 Ala. 501, 48 Am. St. 77, 14 So. Rep. 749, 24 L. R. A. 64, the latter favoring a contrary rule.

<sup>2</sup> *Broom's Max.* 151.

<sup>3</sup> *Woodmansie v. Logan*, 2 N. J. L. 67; *Canter v. American Ins. Co.*, 3 Pet. 307; *Muldoon v. Rickey*, 103 Pa. 110; *Eberly v. Rupp*, 90 id. 259; *Bishop v. American Preservers Co.*, 105 Fed. Rep. 845. See ch. 35.

Where there was an intentional non-entry of an action in which prop-

erty was attached and a new action was brought for the same cause of action, the same property being re-attached, the only claim the defendant in those actions could maintain was for the costs for failure to enter the first writ; for the malicious suing out of the second attachment he had no remedy because no wrong was done. *Johnson v. Reed*, 136 Mass. 421.

One cannot maintain an action for the malicious prosecution of a proceeding to which he was not a party. *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. Rep. 354; *Duncan v. Citizens' Nat. Bank*, 20 Ky. L. Rep. 237, 45 S. W. Rep. 1127.

<sup>4</sup> *Id.*; *Henry v. Dufilho*, 14 La. 48; *Davies v. Jenkins*, 11 M. & W. 745; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. Rep. 343; *Porter v. Johnson*, 96 Ga. 145, 23 S. E. Rep. 123.

the party bringing it is answerable in an action at law by the party injured.<sup>1</sup> The making, *bona fide*, of defamatory statements, though they are harsh, untrue and injurious, in the assertion of rights, in the performance of a duty, or in fair criticism upon a matter of public interest, is also *damnum absque injuria*.<sup>2</sup> Private houses may be pulled down in the interest of the public to prevent the spread of fire,<sup>3</sup> and bulwarks may be raised on private property as a defense against a public enemy. So owners of land exposed to the inroads of the sea, or commissioners having a statutory power to act for a number of such owners, have a right to erect barriers, though they are consequentially prejudicial to others.<sup>4</sup> Owners of land adjoining streets are often subjected to temporary inconvenience while work is being done thereon for their improvement, or to change their grade, or by their temporary use for the deposit of building material or the delivery of merchandise; yet, in the absence of legislation, there is no right to compensation therefor; no legal injury is recognized.<sup>5</sup> The construction of a new way or the discontinuance of an old one may very seriously affect the value of property; the same may result from the removal of a state capital or county seat; but persons suffering loss from such causes have no legal remedy.<sup>6</sup>

<sup>1</sup> See ch. 35.

<sup>2</sup> *Todd v. Hawkins*, 8 C. & P. 88; *Huntley v. Ward*, 6 C. B. (N. S.) 514; *Mackay v. Ford*, 5 H. & N. 792; *Revis v. Smith*, 18 C. B. 126; *Barnes v. McCrate*, 32 Me. 442; *Henderson v. Broomhead*, 4 H. & N. 569; *White v. Nicholls*, 3 How. 266; *Lawson v. Hicks*, 38 Ala. 279; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738; *Allen v. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647; *Lawler v. Earle*, 5 Allen, 22.

<sup>3</sup> *American Print Works v. Lawrence*, 23 N. J. L. 9, 21 id. 248; *Su-  
rocco v. Geary*, 3 Cal. 69; *Russell v.  
Mayor*, 2 Denio, 461; *Field v. Des  
Moines*, 39 Iowa, 575, 18 Am. Rep. 46;  
*Aitken v. Wells River*, 70 Vt. 308, 40  
Atl. Rep. 829, 41 L. R. A. 566.

<sup>4</sup> *King v. Pagham*, 8 B. & C. 355.

<sup>5</sup> *Reading v. Kepplemann*, 61 Pa.

233; *Griggs v. Foote*, 4 Allen, 195;  
*Benjamin v. Wheeler*, 8 Gray, 409;  
*Macey v. Indianapolis*, 17 Ind. 267;  
*Terre Haute v. Turner*, 36 Ind. 532;  
*Radcliff v. Mayor, etc.*, 4 N. Y. 195;  
*Mills v. Brooklyn*, 32 N. Y. 489; *Rome  
v. Omberg*, 28 Ga. 46, 73 Am. Dec.  
748; *Hovey v. Mayo*, 43 Me. 322; *Den-  
ver v. Bayer*, 7 Colo. 113, 2 Pac. Rep.  
6; *Lake Street Elevated R. Co. v.  
Brooks*, 90 Ill. App. 173; *Ridge Ave-  
nue Passenger R. Co. v. Philadelphia*,  
181 Pa. 592, 37 Atl. Rep. 910; *Fernan-  
dez v. Smith*, 43 La. Ann. 708; *Pueblo  
v. Strait*, 20 Colo. 13, 24 L. R. A. 392,  
36 Pac. Rep. 789; *Talbot v. New York  
& H. R. Co.*, 151 N. Y. 155, 45 N. E.  
Rep. 382; *Sanitary District of Chi-  
cago v. McGuirl*, 86 Ill. App. 392.

<sup>6</sup> *Swartz v. Board of Commission-  
ers*, 153 Ind. 141, 63 N. E. Rep. 31, and  
cases cited; *Cooley's Const. Lim.* 384.

A new business may, by competition, greatly impair the productiveness of an old one, but there is no redress for the loss.<sup>1</sup> One who accepts a license from a municipality to sell liquors does so with knowledge that it is revocable at the pleasure of the officers who issued it, and cannot recover damages for its revocation though that be done without cause,<sup>2</sup> or through malice.<sup>3</sup> Damage by way of increased noise, smoke, cinders, etc., due to the elevation of a railroad track and changes in operating the road is *damnum absque injuria* as to one who purchased a lot adjoining the road with notice of the existence of a right of way.<sup>4</sup> A breach of contract does not afford a cause of action where its performance is prevented by law.<sup>5</sup> Regardless of his motive, so long as his acts are not tainted with fraud,<sup>6</sup> a person may sell or offer for sale at any price goods of which he is not the owner, but which he expects or hopes to acquire, and may make his price public.<sup>7</sup> The older

See Weeks' Dam. Absque Injuria, ch. 1; Stout v. Noblesville & E. Gravel R. Co., 83 Ind. 466; Huff v. Donehoo, 109 Ga. 638, 34 S. E. Rep. 1035; Nichols v. Richmond, 162 Mass. 170, 38 N. E. Rep. 501; Buhl v. Fort Street Union Depot Co., 98 Mich. 596, 57 N. W. Rep. 829, 23 L. R. A. 393; Frost v. Washington County R. Co., 96 Me. 76, 86, 51 Atl. Rep. 806, and cases cited.

<sup>1</sup> Masterson v. Short, 3 Abb. Pr. (N. S.) 154; Hanger v. Little Rock Junction R., 52 Ark. 61, 11 S. W. Rep. 965.

<sup>2</sup> Ison v. Mayor of Griffin, 98 Ga. 623, 25 S. E. Rep. 611.

<sup>3</sup> Raycroft v. Tayntor, 68 Vt. 219, 33 L. R. A. 225, 35 Atl. Rep. 53; Docter v. Riedel, 96 Wis. 158, 71 N. W. Rep. 119, 37 L. R. A. 580.

<sup>4</sup> Kotz v. Illinois Central R. Co., 188 Ill. 578, 59 N. E. Rep. 240.

<sup>5</sup> Malcomson v. Wappoon Mills, 88 Fed. Rep. 680; People v. Globe Mut. L. Ins. Co., 91 N. Y. 174. *Contra*, Spader v. Mural Decoration Manuf. Co., 47 N. J. Eq. 18.

<sup>6</sup> See Richardson v. Silvester, L. R. 9 Q. B. 34.

<sup>7</sup> Ajello v. Worsley, [1898] 1 Ch. Div. 274. For other illustrations see Southwestern Telegraph & T. Co. v. Beatty, 63 Ark. 65, 37 S. W. Rep. 570; Cleveland City R. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. Rep. 604; Macomber v. Nichols, 34 Mich. 212; Waffle v. Porter, 61 Barb. 130; Farmer v. Lewis, 1 Bush, 66; Pontiac v. Carter, 32 Mich. 164; Winters' Appeal, 61 Pa. 307; Tinicum Fishing Co. v. Carter, id. 21; Conger v. Weaver, 6 Cal. 548; Baker v. Boston, 12 Pick. 184; Winchester v. Osborn, 62 Barb. 337; Gould v. Hudson River R. Co., 6 N. Y. 522; Rood v. New York, etc. R. Co., 18 Barb. 80; Tyson v. Commissioners, 28 Md. 510; Tonawanda R. Co. v. Munger, 5 Denio. 255; Radcliff v. Mayor, etc., 4 N. Y. 195; Botsford v. Wilson, 75 Ill. 132; Mitchell v. Harmony, 13 How. 135; Cleveland, etc. R. Co. v. Speer, 56 Pa. 325; Snyder v. Pennsylvania R. Co., 55 Pa. 340; Hollister v. Union Co., 9 Conn. 436; Runnels v. Bullen, 2 N. H. 532.

cases, at least to some extent, conditioned the exemption of the owner of property from liability for damages to another caused by his lawful use of it upon the motive which actuated such use, and that qualification has been embodied in several of the propositions stated in this section. The better rule doubtless is that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."<sup>1</sup>

[6] The futility of cases of *wrong without injury* is illustrated by cases in which damages are the gist of the action and none are shown.<sup>2</sup> A statute making it a misdemeanor for any citizen to assign or transfer a claim for debt against any other citizen for the purpose of having the same collected out of the wages or personal earnings of the debtor, in courts outside of the state of the parties' residence, was held in Indiana to be designed merely to promote the public welfare and not to redress private grievances. The violation of it, though the consequence is the collection of the debt, is not an injury in a legal sense to the debtor, though such collection could not have been enforced under the exemption laws of the state in which the debtor and creditor resided.<sup>3</sup> It is not easy to har-

<sup>1</sup> Mayor, etc. of Bradford v. Pickles, [1895] App. Cas. 587; Fisher v. Feige, 137 Cal. 39, 59 L. R. A. 333, 69 Pac. Rep. 618. A limitation of the rule is suggested in the last case, based on the right to use water for irrigating purposes under the local law.

<sup>2</sup> Ford v. Smith, 1 Wend. 48; Kimball v. Connolly, 3 Keyes, 57, 33 How. Pr. 237; Hutchins v. Hutchins, 7 Hill, 104; Pollard v. Lyons, 91 U. S. 225; Bassil v. Elmore, 65 Barb. 627; Kendall v. Stone, 5 N. Y. 14; Swan v. Tappan, 5 Cush. 104; Dung v. Parker, 52 N. Y. 494; Cook v. Cook, 100 Mass. 194; Millard v. Jenkins, 9 Wend. 298; Stark v. Chitwood, 5 Kan. 141; Franklin v. Smith, 21 Wend. 624; Mayer v. Walter, 64 Pa. 283; Birch v. Benton, 26 Mo. 153; Speaker v. McKenzie, id. 255; Girard v. Moore, 86 Tex. 675, 26 S. W. Rep. 845.

<sup>3</sup> Uppinghouse v. Mundel, 103 Ind. 238, 2 N. E. Rep. 719.

A statute of similar import is repugnant to the fourteenth amendment to the federal constitution. In re Flukes, 157 Mo. 125, 57 S. W. Rep. 545, 51 L. R. A. 176. But not void under the constitution of Nebraska, nor under sec. 1, art. 4, federal constitution. Singer Manuf. Co. v. Fleming, 39 Neb. 679, 52 N. W. Rep. 226, 23 L. R. A. 210.

A debtor is not defrauded by being induced by a false representation to pay his debt. Brown v. Blunt, 72 Me. 415.

A creditor who fraudulently induces his creditor to come from the state of his residence into that of the former's domicile, with intent to cause his arrest and compel him to pay for his release, commits an actionable fraud. Sweet v. Kimball, 166 Mass. 332, 44 N. E. Rep. 243, 55 Am. St. 406.

monize this doctrine with that which gives a right of action against a creditor who seizes his debtor's exempt property or garnishes his exempt wages;<sup>1</sup> or with that which enjoins a citizen from prosecuting an attachment in the courts of another state against a co-citizen for the purpose of enforcing the payment of a demand out of earnings which are exempt by the law of the domicile.<sup>2</sup> In a late case it is held that a citizen who sues a debtor in another state for the purpose of evading the exemption laws of the state of which they are both residents is liable for such damages as may result.<sup>3</sup> Another such case determines that a creditor who prosecutes an attachment in a foreign state against a resident of a state a statute of which forbids such proceedings against a debtor's exempt property, and in violation of an order of court, is liable to his debtor after collection of his demand.<sup>4</sup>

§ 4. **Public wrongs.** The law does not give a private remedy for anything but a private wrong.<sup>5</sup> A public wrong, though the perpetrator of it may be subject to prosecution by the public, may also have the nature and consequences of a private wrong, and be actionable as such in behalf of a person who sustains an injury differing in kind from that which the public at large suffers.<sup>6</sup> A land-owner who has a right of egress in

<sup>1</sup> *Albrecht v. Treitschke*, 17 Neb. 205, 22 N. W. Rep. 418; *Haswell v. Parsons*, 15 Cal. 266.

<sup>2</sup> *Snook v. Snetzer*, 25 Ohio St. 516; *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. Rep. 747; *Stewart v. Thomson*, 97 Ky. 575, 31 S. W. Rep. 133, 53 Am. St. 431.

<sup>3</sup> *Stark v. Bare*, 39 Kan. 100, 17 Pac. Rep. 826.

<sup>4</sup> *Main v. Field*, 13 Ind. App. 401, 40 N. E. Rep. 1103.

<sup>5</sup> 3 Black. Com. 219.

<sup>6</sup> *Chicago v. Union Building Ass'n*, 102 Ill. 379, 393; *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243, 15 Pac. Rep. 339; *Rose v. Miles*, 4 M. & S. 101; *Greasly v. Codling*, 2 Bing. 263; *Mayor, etc. v. Henley*, 1 Bing. N. C. 222; *Goldthorpe v. Hardman*, 13 M. & W. 377; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Crom-*

*melin v. Coxe*, 30 Ala. 318; *Lansing v. Wiswall*, 5 Denio, 213; *Lansing v. Smith*, 8 Cow. 146, 4 Wend. 9; *Pierce v. Dart*, 7 Cow. 609; *Mills v. Hall*, 9 Wend. 315; *Myers v. Malcolm*, 6 Hill, 292; *Gates v. Blincoe*, 2 Dana, 158; *Shulte v. North Pacific Transportation Co.*, 50 Cal. 592; *Baxter v. Winnooski Turnpike Co.*, 22 Vt. 114; *Seeley v. Bishop*, 19 Conn. 128; *Stetson v. Faxon*, 19 Pick. 147; *Francis v. Schoellkopf*, 53 N. Y. 152; *Venard v. Cross*, 8 Kan. 248; *Pittsburgh v. Scott*, 1 Pa. 309; *Runyan v. Bordine*, 14 N. J. L. 472; *Hatch v. Vermont Central R. Co.*, 28 Vt. 142; *Brown v. Watson*, 47 Me. 161; *Bruning v. New Orleans, etc. Co.*, 12 La. Ann. 541; *Clark v. Peckham*, 10 R. I. 35; *Gordon v. Baxter*, 74 N. C. 470; *Dudley v. Kennedy*, 63 Me. 465; *Hamilton v. Mayor, etc.*, 52 Ga. 435; *Baxter v.*

a given direction by way of a street may have an injunction to restrain the closing of the street, on the theory that, by being obliged to take a circuitous route to reach a place or object, he suffers special damage.<sup>1</sup> On grounds of public policy, and because judgments cannot be impeached in collateral proceedings, a party to a suit cannot maintain an action against his successful adversary for suborning a witness whose false testimony tended to produce the judgment;<sup>2</sup> nor for the adverse party's fraud and false swearing, so long as the judgment stands.<sup>3</sup> For like reasons a defeated suitor cannot maintain an action for damages against a witness for falsely testifying in favor of the adverse party.<sup>4</sup> Where a statute prohibited the sending of animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the violation of it, with knowledge, was a public offense, but it did not amount, by implication, to a representation that the animals sent were sound, and did not raise, as between the parties to a sale of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of buying the animals.<sup>5</sup> A citizen cannot recover damages from a canal company for its failure to reconstruct a part of its canal because he was thereby prevented from deriving a profit by the use of his boat on the canal.<sup>6</sup>

**§ 5. Illegal transactions.** It may be assumed as an undisputed principle that no action will lie to recover a demand, or

Coughlin, 70 Minn. 1, 72 N. W. Rep. 797; *Pueblo v. Strait*, 20 Colo. 13, 36 Pac. Rep. 789, 24 L. R. A. 392. See *Shaubut v. St. Paul, etc. R. Co.*, 21 Minn. 502; *Proprietors, etc. v. Newcomb*, 7 Met. 276; *Pekin v. Brereton*, 67 Ill. 477.

<sup>1</sup>*Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Glasgow v. St. Louis*, 15 id. 112, 87 Mo. 678; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. Rep. 130.

<sup>2</sup>*Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; *Ross v. Wood*, 70 N. Y. 8; *United States v. Throckmorton*, 98 U. S. 61; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. Rep. 970, 27 id. 537, 13 L. R. A. 336; *Gray v.*

*Barton*, 62 Mich. 196, 28 N. W. Rep. 813; *Eyres v. Sedgewicke*, Cro. Jac. 601; *Young v. Leach*, 27 App. Div. 293, 50 N. Y. Supp. 670.

<sup>3</sup>*Curtis v. Fairbanks*, 16 N. H. 542; *Lyford v. Demerritt*, 32 N. H. 234; *Damport v. Sympson*, Cro. Eliz. 520; *Revis v. Smith*, 18 C. B. 125.

<sup>4</sup>*Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231.

<sup>5</sup>*Ward v. Hobbs*, L. R. 4 App. Cas. 13. See *Mairs v. Baltimore & O. R. Co.*, 73 App. Div. 265, 76 N. Y. Supp. 838; *Midland Ins. Co. v. Smith*, 6 Q. B. Div. 561; *Bradlaugh v. Clarke*, L. R. 8 App. Cas. 354.

<sup>6</sup>*Saylor v. Pennsylvania Canal Co.*, 183 Pa. 167, 38 Atl. Rep. 598.

a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depending in any degree upon an illegal agreement to which he was a party.<sup>1</sup> A bank is not liable for failure to perform its contract to lend or advance money to be used in speculating in futures.<sup>2</sup> The sender of a telegram relating to a gambling contract in stocks cannot invoke such contract, or the gain or loss resulting from it, to measure the damages sustained in consequence of its non-delivery.<sup>3</sup> This principle does not extend to a contract which is merely *ultra vires*, involves no turpitude, and does not offend against any express statute.<sup>4</sup> Neither does it follow that if two persons are engaged in the same unlawful enterprise, each of them while so engaged is irresponsible for wilful injuries done to the property of the other. If, in such a case, the plaintiff can maintain his action without being obliged to show that he was unlawfully engaged when his right to bring it accrued he may recover; his action cannot be defeated because the defendant makes proof of the illegal act. The latter cannot be relieved from the consequences of his unlawful conduct by showing the wrong-doing of the plaintiff and his own participation therein.<sup>5</sup> In Massachusetts, if the injury is sustained on the Lord's day and results from the negligence of the defendant, no element of wilfulness existing, the violation of the statute

<sup>1</sup> Welch v. Wesson, 6 Gray, 505; Gregg v. Wyman, 4 Cush. 123; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Simpson v. Bloss, 7 Taunt. 246; Myers v. Meinrath, 101 Mass. 366; Connolly v. Boston, 117 Mass. 64; Gulf, etc. R. Co. v. Johnson, 71 Tex. 619, 9 S. W. Rep. 602, 1 L. R. A. 730; Kitchen v. Greenabaum, 61 Mo. 110; The Arrogante Barcelones, 7 Wheat. 496; The Clarita and The Clara, 23 Wall. 1; Meguire v. Corwine, 101 U. S. 108; Oscanyan v. Winchester Arms Co., 103 id. 261; Niagara Falls Brewing Co. v. Wall, 98 Mich. 158, 57 N. W. Rep. 99; Haggerty v. St. Louis Ice Manuf. & Storage Co., 143 Mo. 238, 65 Am. St. 647, 40 L. R. A. 151, 44 S. W. Rep. 1114; Pullman's

Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 150, 18 Sup. Ct. Rep. 808; Bishop v. American Preservers Co., 105 Fed. Rep. 845; Meyers v. Merrillion, 118 Cal. 352, 50 Pac. Rep. 662; Edwards v. Randle, 63 Ark. 318, 58 Am. St. 108, 36 L. R. A. 174, 38 S. W. Rep. 518; Kelly v. Courter, 1 Okla. 277, 30 Pac. Rep. 372.

<sup>2</sup> Moss v. Exchange Bank, 102 Ga. 808, 30 S. E. Rep. 267, overruling Western U. Tel. Co. v. Blanchard, 68 Ga. 299.

<sup>3</sup> Morris v. Western U. Tel. Co., 94 Me. 423, 47 Atl. Rep. 926.

<sup>4</sup> Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. Rep. 390, 36 L. R. A. 664.

<sup>5</sup> Welch v. Wesson, 6 Gray, 505.

concerning the observance of that day is regarded as contributory negligence, though the plaintiff is otherwise free from fault.<sup>1</sup> As applied to actions which are not based on contract the rule stated is generally disapproved.<sup>2</sup> "The cases may be summed up," said Dixon, C. J., "and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and secondly, that the fault, want of due care or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of as contributing to it must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it."<sup>3</sup> Though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which is the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.<sup>4</sup>

**§ 6. Contractual exemption from liability for damages.** The benefit of the rules of law which provide compensation for injury may, where no question of public policy is involved,

<sup>1</sup> *Bosworth v. Swansey*, 10 Met. 363, 43 Am. Dec. 441; *Jones v. Andover*, 10 Allen, 18.

<sup>2</sup> *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Louisville, etc. R. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520, 19 N. E. Rep. 453, 9 Am. St. 883; *Same v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594, 1 L. R. A. 730; *Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278, 18 N. W. Rep. 17; *Gulf, etc. R. Co. v. Johnson*, 71 Tex. 619, 9 S. W. Rep. 602, and numerous other cases referred to in the three first cited; *Kansas City v. Orr*, 62 Kan. 61, 61

Pac. Rep. 397, 50 L. R. A. 783, citing numerous cases.

An action lies for injury done to property used for gaming purposes if it was not so used at the time it was damaged. *Gulf, etc. R. Co. v. Johnson*, 71 Tex. 619, 9 S. W. Rep. 602, 1 L. R. A. 730.

<sup>3</sup> *Sutton v. Wauwatosa*, *supra*; *Taylor v. Western U. Tel. Co.*, 95 Iowa, 740, 64 N. W. Rep. 660.

<sup>4</sup> *Planters' Bank v. Union Bank*, 16 Wall. 483; *McBlair v. Gibbes*, 17 How. 232; *Kinsman v. Parkhurst*, 18 How. 289; *Brooks v. Martin*, 2 Wall. 70.



be waived or relinquished in whole or in part by contract.<sup>1</sup> Thus persons engaged in public employments out of which spring duties and responsibilities to patrons may be relieved to some extent by contract of liabilities imposed by law, where such waivers or limitations are reasonable and not inconsistent with sound public policy. The responsibility of a common carrier as an insurer may be so limited by contract.<sup>2</sup> It is settled, however, that a carrier cannot, by any agreement with shippers or patrons, relieve itself from responsibility for its own negligence, or that of its servants; and this because such release is unreasonable and contrary to public policy.<sup>3</sup> The weight of authority is to the contrary where injury is sustained by a passenger while riding on a free pass which stipulates for the release of the carrier's liability for injury sustained through its negligence.<sup>4</sup>

At common law there was no right to recover damages for negligence which caused the death of a human being. That right, being given by statute, may thereby be abolished or

<sup>1</sup> *Geiser Manuf. Co. v. Krogman*, 111 Iowa, 503, 82 N. W. Rep. 938, citing the text; *Griswold v. Illinois Central R. Co.*, 90 Iowa, 265, 57 N. W. Rep. 843, 24 L. R. A. 647.

<sup>2</sup> See *Meehem's Hutchinson on Carriers*, ch. 7; note to *Cole v. Goodwin*, 32 Am. Dec. 495-506; ch. 21.

<sup>3</sup> *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 181; *Railway Co. v. Stevens*, 95 id. 655; *Chicago, etc. R. Co. v. Abels*, 60 Miss. 1017; *Wallingford v. Columbia & G. R. Co.*, 26 S. C. 258, 30 Am. & Eng. R. Cas. 40, 2 S. E. Rep. 19; *Alabama, etc. R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *American Exp. Co. v. Sands*, 55 Pa. 140; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Judson v. Western R. Corp.*, 6 Allen, 486; *Ball v. Wabash, etc. R. Co.*, 83 Mo. 574; *Christenson v. American Exp. Co.*, 15 Minn. 270.

The rule seems to be different in New York if the intention is clearly expressed. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Nicholas v.*

*New York Central, etc. R. Co.*, 89 id. 370.

A railway company may contract as a private carrier for the transportation of matter for express companies, and require exemption from liability as a condition precedent to carrying. *Pittsburgh, etc. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. Rep. 917, 40 L. R. A. 101. *Contra*, *Voight v. Baltimore, etc. R. Co.*, 79 Fed. Rep. 561.

<sup>4</sup> *Payne v. Terre Haute & I. R. Co.*, 157 Ind. 616, 62 N. E. Rep. 472; *Griswold v. New York, etc. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. Rep. 261; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. Rep. 269, 25 L. R. A. 491; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R. A. 846; *Kinney v. Central R. Co.*, 34 N. J. L. 513, 3 Am. Rep. 265; *Wells v. New York, etc. R. Co.*, 24 N. Y. 181; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. Rep. 422, 22 L. R. A. 794, 38 Am. St. 901, 10 Wash. 311, 38 Pac. Rep. 995, 45 Am. St. 787.

limited. But after the right of unlimited recovery for personal injury or for death caused by negligence has been declared by the constitution, no statute which purports to fix limits to the amount recoverable can have effect.<sup>1</sup> The value of the interest of a wife and children in the life of the husband and father, and the amount they may recover in case of his death through the negligence of another, cannot be affected by any contract he may make.<sup>2</sup> Neither will the acceptance of money in pursuance of such a contract, nor the execution of a release of liability by the widow, affect the administrator's right of action on behalf of the widow and children.<sup>3</sup>

It is an open question in nearly all the states whether a contract between persons who sustain the relation of master and servant to each other, by which the former undertakes to secure immunity beforehand from the liability attaching to his negligence as master, is valid. In Georgia a contract by which the servant assumes all risks connected with or incident to his employment, whether resulting from his own negligence or fault or that of any other person in the master's service, is valid if any criminal neglect is not waived.<sup>4</sup> A railroad company which is a party to such a contract does not enter into it as a common carrier; hence the principle which limits its power to restrict its liability in the latter capacity does not affect the agreement.<sup>5</sup> It is strongly intimated in Arkansas that a stipulation which relieves the employer from liability for the negligence of co-servants (he having selected such as are competent in the first instance, and afterwards discharged those found careless, vicious or inefficient) might

<sup>1</sup> *Pennsylvania R. Co. v. Bowers*, 124 Pa. 183, 6 Atl. Rep. 836, 2 L. R. A. 621.

Where the United States authorizes a suit to be brought against it and after it has been brought repeals the authorizing act, there cannot be a recovery for damages sustained after such repeal. *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854.

<sup>2</sup> *Maney v. Chicago, etc. R. Co.*, 49 Ill. App. 105; *Chicago, etc. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. Rep.

1120; *Chicago, etc. R. Co. v. Martin*, 59 Kan. 437, 53 Pac. Rep. 461. See *Oyster v. Burlington Relief Department*, — Neb. —, 91 N. W. Rep. 699.

<sup>3</sup> *Id.*

<sup>4</sup> *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Galloway v. Western & A. R. Co.*, 57 Ga. 512; *Cook v. Western & A. R. Co.*, 72 Ga. 48; *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. Rep. 322.

<sup>5</sup> *Western & A. R. Co. v. Bishop*, *supra*; *Little Rock, etc. R. v. Eu-banks*, 48 Ark. 460, 3 S. W. Rep. 808.

be sustained as reasonable, notwithstanding the abolishment of the common-law rule of non-liability for the acts and omissions of fellow-servants.<sup>1</sup> This intimation was made with decisions before the court which hold otherwise. The Indiana supreme court has declared that the employer may not, by a contract with his employee, put upon the latter the risks arising from the employer's disregard of specific statutory requirements for the employee's safety.<sup>2</sup>

The cases which deny the validity of such contracts do so upon the ground that they are contrary to public policy.<sup>3</sup> On this ground contracts which assume to relieve employers from liability for neglect to furnish suitable appliances are void.<sup>4</sup> It is provided by the statute known as the English employers' liability act, 1880, that where personal injury is caused to a workman in specified cases he may, or in case death is caused by the injury his representatives shall, have the same right of compensation and remedies against the employer as if the workman had not been in the employer's service. This has been held to affect the contract so far only as to negative the implication of an agreement on the workman's part to assume the risks of the employment. It does not render invalid his express contract to relieve the employer from liabil-

<sup>1</sup> Little Rock, etc. R. v. Eubanks, *supra*.

<sup>2</sup> Davis Coal Co. v. Polland, 158 Ind. 607, 618, 62 N. E. Rep. 492, citing Narramore v. Cleveland, etc. R. Co. 96 Fed. Rep. 298, 37 C. C. A. 499, 48 L. R. A. 68; Durant v. Lexington Coal Mining Co., 97 Mo. 62, 10 S. W. Rep. 484; Greenlee v. Southern R. Co., 122 N. C. 977, 30 S. E. Rep. 115, 41 L. R. A. 399, 65 Am. St. 734; Baddeley v. Earl Granville, 19 Q. B. Div. 423, 17 Eng. Rul. Cas. 212; Groves v. Wimborne, [1898] 2 Q. B. 402; Curran v. Grand Trunk R. Co., 25 Ont. App. 407.

<sup>3</sup> Railway Co. v. Spangler, 44 Ohio St. 471; Kansas Pacific R. v. Peavey, 29 Kan. 169, 34 Kan. 472, 8 Pac. Rep. 780.

<sup>4</sup> Little Rock, etc. R. v. Eubanks,

48 Ark. 460, 3 S. W. Rep. 808; Roesner v. Hermann, 10 Biss. 486, 8 Fed. Rep. 782; Runt v. Herring, 2 N. Y. Misc. 105, 21 N. Y. Supp. 244 (including besides the agreement not to sue, a condition not to appear as a witness, etc.).

A contract to which an employee is not a party cannot affect his right to recover against his employer. Ominger v. New York Central R. Co., 6 Thomp. & Cook, 498; Kenney v. Same, 54 Hun, 143, 7 N. Y. Supp. 255. The master's liability is not affected by a rule, which is made part of the contract, requiring that the servant shall be responsible for the condition of the appliances with which he works. Ford v. Fitchburg R. Co., 110 Mass. 240, 261.

ity for injuries sustained in the employment; and a contract which expressly releases all right on behalf of the servant and his representatives to claim compensation is not void as against public policy because it affects only the interest of the employed.<sup>1</sup> This position, it seems to the writer, is well answered by Smith, J., who said: But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railway company and every owner of a factory, mill or mine would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity.<sup>2</sup>

A contract of membership between a railroad employee and the voluntary relief department of the railroad, such department being a beneficial insurance association largely supported by the employer, which permits the employee, if he sustains injury, either to sue for damages or accept the benefit of the relief fund, and which makes such acceptance a release

<sup>1</sup> *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357. The substance of the opinion in this case is given in a note in 44 Am. Rep. 633.

<sup>2</sup> *Little Rock, etc. R. v. Eubanks*, 48 Ark. 460, 468, 3 S. W. Rep. 808.

An Indiana statute nullifies contracts made by corporations with their employees releasing the former from liability to the latter for personal injuries. Such statute includes a contract which binds the employee

to accept certain benefits in lieu of damages, and the acceptance of the benefits does not bar his right of action. *Pittsburgh, etc. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. Rep. 582. As to what contracts are not within a similar statute, see *Railway Co. v. Cox*, 55 Ohio St. 497, 45 N. E. Rep. 641. Such statutes are void. *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931.

and satisfaction of his damages, is not void as against public policy, and the acceptance of money from such department bars an action for damages,<sup>1</sup> and estops the employee from alleging that the contract was *ultra vires* his employer.<sup>2</sup> Such contracts are clearly distinguishable from those in which the right of action is bargained away in advance because such right exists until after the employee has knowledge of all the facts, and then he elects between his right against the relief fund and his action for damages.<sup>3</sup> Such a contract is binding on an infant if beneficial to him.<sup>4</sup>

§ 7. **Nature of the right to damages; its survival.** When a cause of action arises it has a legal value as a chose in [7] action; it is a species of property.<sup>5</sup> The right to damages vests when the act or neglect out of which it arises occurs. Even where there is no legal measure of damages, as in case of slander or assault, the injured party has an indeterminate right

<sup>1</sup> *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 38 L. R. A. 750, 48 N. E. Rep. 496, affirming 64 Ill. App. 444; *Chicago, etc. R. Co. v. Miller*, 22 C. C. A. 264, 76 Fed. Rep. 439; *Maine v. Chicago, etc. R. Co.*, 70 N. W. Rep. 630 (Iowa); *Chicago, etc. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. Rep. 314; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. Rep. 423; *Pittsburgh, etc. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. Rep. 917; *Same v. Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. Rep. 290; *Chicago, etc. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. Rep. 42; *Railway Co. v. Cox*, 55 Ohio St. 497, 45 N. E. Rep. 641; *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. 127, 29 Atl. Rep. 854; *Ringle v. Pennsylvania R.*, 164 Pa. 529, 30 Atl. Rep. 492; *Vickers v. Chicago, etc. R. Co.*, 71 Fed. Rep. 139; *Shaver v. Pennsylvania Co.*, id. 931; *Brown v. Baltimore & O. R. Co.*, 6 D. C. App. Cas. 237; *Spitze v. Same*, 75 Md. 162, 23 Atl. Rep. 307; *Petty v. Brunswick & W. R. Co.*, 109 Ga. 666, 35 S. E. Rep. 82; *Carter v. Same*, 115 Ga. 853, 42 S. E. Rep. 239; *Donald v. Chicago, etc. R. Co.*, 93 Iowa, 284, 61 N. W. Rep. 971; *Fuller v. Baltimore, etc. Ass'n*, 67 Md. 433, 10 Atl. Rep. 237; *Otis v. Pennsylvania Co.*, 71 Fed. Rep. 136. *Contra*, *Miller v. Chicago, etc. R. Co.*, 65 Fed. Rep. 305. The South Carolina court was equally divided on the question of the validity of such a contract. *Johnson v. Charleston & S. R. Co.*, 55 S. C. 152, 32 S. E. Rep. 2, 33 id. 174, 44 L. R. A. 645. The doctrine of the *Miller* case, *supra*, is inferentially disapproved in 76 Fed. Rep. 439, 22 C. C. 264, by the statement that the authorities were all the other way, though the reviewing court did not find it necessary to expressly pass upon the question. See article in 8 Va. Law Reg. 858.

<sup>2</sup> *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 48 N. E. Rep. 496, 38 L. R. A. 750.

<sup>3</sup> *Railway Co. v. Cox*, 55 Ohio St. 497, 45 N. E. Rep. 641; *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. 127, 29 Atl. Rep. 854.

<sup>4</sup> *Clements v. London, etc. R. Co.*, [1894] 2 Q. B. 482.

<sup>5</sup> 2 Black. Com. 438.

*Chicago, etc. R. Co.*, 93 Iowa, 284, 61

to compensation the instant he receives the injury. The verdict of the jury and the judgment of the court thereon do not give, they only define, the right.<sup>1</sup> Such right when vested is to the injured party of the nature of property, and is protected as property in tangible things is protected. It cannot be annulled<sup>2</sup> or changed by legislation,<sup>3</sup> nor extinguished except by satisfaction, release or the operation of statutes of limitation.<sup>4</sup> Trover will lie for its conversion<sup>5</sup> or the conversion of paper evidence of it;<sup>6</sup> and other actions will lie for breaches of duty or contract, as well as for other wrongs relating to it.<sup>7</sup> Except when the right of action and to damages is for a personal tort or breach of a marriage promise, it survives the death of the injured party and is assignable.<sup>8</sup>

[8] The general subject embraces the principles and illustrative examples by which all legal causes of action may be tested and their pecuniary value measured or adjudicated. By these courts determine, first, whether the party complaining has suffered a legal injury, and how the conclusion that he

<sup>1</sup> 2 Black. Com. 438.

<sup>2</sup> Cooley on Const. Lim. 449; Streubel v. Milwaukee, etc. R. Co., 12 Wis. 67; Westervelt v. Gregg, 12 N. Y. 211; Dash v. Van Kleeck, 7 Johns. 477; Thornton v. Turner, 11 Minn. 336; Terrill v. Rankin, 2 Bush, 453, 92 Am. Dec. 500; Williar v. Baltimore, etc. Ass'n, 45 Md. 546; Griffin v. Wilcox, 21 Ind. 370.

<sup>3</sup> Chicago, etc. R. Co. v. Pounds, 11 Lea, 127.

<sup>4</sup> Bowman v. Teall, 23 Wend. 305; Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Christianson v. Linford, 3 Robert. 215; Baylis v. Usher, 4 Moore & P. 790; Bayliss v. Fisher, 7 Bing. 153; Willoughby v. Backhouse, 4 Dowl. & Ry. 539, 2 B. & C. 821; Clark v. Meigs, 10 Bosw. 337.

<sup>5</sup> Ayres v. French, 41 Conn. 151; Payne v. Elliot, 54 Cal. 341, 342.

<sup>6</sup> Fullam v. Cummings, 16 Vt. 697; Archer v. Williams, 2 C. & K. 26; Comparet v. Burr, 5 Blackf. 419; Hudspeth v. Wilson, 2 Dev. 372, 21 Am.

Dec. 344; Pierce v. Gilson, 9 Vt. 216; Moody v. Keener, 7 Port. 218.

<sup>7</sup> Terry v. Allis, 20 Wis. 32; Evans v. Trenton, 24 N. J. L. 764; Allen v. Suydam, 17 Wend. 368; Walker v. Bank, 9 N. Y. 582; McNair v. Burns, 9 Watts, 130; Rhinelander v. Barrow, 17 Johns. 538.

<sup>8</sup> Hullett v. Baker, 101 Tenn. 689, 49 S. W. Rep. 757; Final v. Backus, 18 Mich. 218; Sears v. Conover, 3 Keyes, 113; North v. Turner, 9 S. & R. 244; Johnston v. Bennett, 5 Abb. Pr. (N. S.) 331; Richtmeyer v. Remsen, 38 N. Y. 206; Waldron v. Willard, 17 N. Y. 466; McKee v. Judd, 12 N. Y. 622; Rice v. Stone, 1 Allen, 566; Munsell v. Lewis, 4 Hill, 635; Jordan v. Gillen, 44 N. H. 424; Grant v. Ludlow's Adm'r, 8 Ohio St. 1; Taylor v. Galland, 3 G. Greene, 17; Blakeney v. Blakeney, 6 Port. 109; Nettles v. Barnett, 8 Port. 181; Hoyt v. Thompson, 5 N. Y. 347; Brig Sarah Ann, 2 Sumn. 211; Meech v. Stoner, 19 N. Y. 26; Linton v. Hurley, 104 Mass. 353. See Barnard v. Harrington, 3 Mass. 228.

has shall be expressed in damages; and secondly, they direct and limit the inquiries for the ascertainment of the amount which shall be recovered by way of recompense.

§ 8. **Injuries to unborn child.** In 1884 the question was raised in Massachusetts whether a child prematurely born, and surviving only a few minutes, in consequence of an injury to its mother, was a "person" within the meaning of a statute giving an action for the loss of life against the town whose defective highway caused the death of any person. The court, after reviewing, by Holmes, J., the argument in favor of the administrator of the child; which was based on Lord Coke's statement to the effect that if a woman is quick with child, and takes a potion, or if a man beats her and the child is born alive and dies of the potion or battery, this is murder,<sup>1</sup> said that "no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." If the difficulties stated by the court could be got over, "and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted with the question raised by the defendant, whether an infant dying before it was able to live separate from its mother could be said to be a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator.<sup>2</sup> And this question would not be disposed of by

<sup>1</sup> 3 Inst. 50; 1 Hawk. P. C., c. 31, § 16; 1 Black. Com. 129, 130; 4 id. 198; Beale v. Beale, 1 P. Wms. 244, 246; Burdet v. Hopegood, id. 486; Rex v. Senior, 1 Moody C. C. 346.

The court did not consider how far the statement in the text would be followed by it, if the question were to be regarded as one at common law, but observed that it was opposed to the case in 3 Ass., pl. 2, Y. B. 1 Ed.

III. 23, pl. 18; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale. Fitz. Abr., "Enditement," pl. 4; "Corone," pl. 146; Bro. Abr., "Corone," pl. 146; 1 Hale P. C. 433. See note 3, p. 22.

<sup>2</sup> Marsellis v. Thalhimier, 2 Paige, 36; Harper v. Archer, 4 Sm. & M. 99.

In the first case it was held that "an unborn child, after conception,

citing those cases where equity has recognized the infant provisionally while still alive *en ventre*.<sup>1</sup> And perhaps not by showing that such an infant was within the protection of the criminal law. . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, and damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."<sup>2</sup> In 1891 the court of queen's bench in Ireland ruled that an infant who was deformed from its birth by reason of an accident which happened to its mother while it was *en ventre sa mere* could not maintain an action for the permanent injuries thereby inflicted. The mother was injured while a passenger on a railroad train. The chief justice said that the statement of claim did not allege that the mother made any contract in reference to the child — the contract was with the mother in respect of herself alone. It did not allege that any consideration was received by the company in respect of the child. It did not allege that the company, through its servants or otherwise, knew anything about the child or the condition of the mother. "It is quite plain, for aught that appears in this statement of claim, that however the child in the womb may be regarded, whether as part of the mother or having a distinct personality — whether an entity or a nonentity,—it was, so far as any actual relation the company had with it, a nonentity; and therefore, in my opinion, the existence of the duty, for the breach of which the defendants would be liable as carriers of passengers, cannot be inferred. To infer the existence of such a duty from the mere possibility that the mother was with child when she was received as a passenger by the defendants would be to act without the sanction of any judicial decision, or, in my opinion, of any legal principle."<sup>3</sup> The same judge was anxious to have it

is to be considered *in esse* for the purpose of enabling it to take an estate or for any other purpose which is for the benefit of the child, if it should be afterwards born alive." See note 3, this page.

<sup>1</sup> Lutterel's Case, stated in Hale v. Hale, Prec. Ch. 50; Wallis v. Hodson,

2 Atk. 114, 117. See Musgrave v. Parry, 2 Vern. 710.

<sup>2</sup> Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242.

<sup>3</sup> Walker v. Great Northern R. Co., 28 L. R. Ire. 69.

The arguments for the respective parties are thus summarized by the



understood that he did not go so far as to hold that if a person, knowing that a woman is *enciente*, wilfully inflicts injuries on her with a view to injuring the child, which is born a cripple or becomes so subsequently as a result of the injuries, an ac-

chief justice (O'Brien): Counsel for the company principally rely upon an undoubted proposition of criminal law, that under no circumstances is it held at the present day to be murder to destroy a child whilst in the womb. In Russell on Crimes, 645, it is stated on the authority of Lord Hale "that an infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder, and that therefore, if a woman being quick or great with child take any potion, or cause an abortion, or if another give her any such potion, or cause an abortion, or if a person strike her whereby the child within is killed, it is not murder or manslaughter." And they also rely upon what seems clearly established in the case of descent at common law, that a child *en ventre sa mere* is considered not in existence; and, referring to Richards v. Richards, Johns. 754, they show "that the qualified heir was entitled to the rents and profits until the posthumous heir was born." Plaintiffs replied that the last point was an exception to the general rule which arose from the rigor of the common law with regard to real estates requiring a tenant to the *præcipe*, as pointed out in Thellusson v. Woodford, 4 Ves. 335. Mr. Justice Buller in that case observed in replying to the contention that a child *en ventre sa mere* was a nonentity: Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be even executor. He may take under the statute of distributions.

He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian. Some other cases put this beyond all doubt. In Wallis v. Hodson, 2 Atk. 117, Lord Hardwicke says: The 'principal reason I go upon in the question is that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that, by the rules of the common and civil law, she was to all intents and purposes a child as much as if born in the father's lifetime.' In the same case Lord Hardwicke takes notice that the civil law confines these rules to cases where it is for the benefit of the child to be considered as born; but notwithstanding, he states the rule to be that such child is to be considered living to all intents and purposes." Mr. Justice Buller stated in Thellusson v. Woodford, *supra*, that the words "'that whenever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered actually born' were used by me because I found them in the book whence the passage was taken. Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons." In Rex v. Senior, 1 Moody C. C. 346, all the judges except two sitting, it was unanimously decided that a doctor who, through culpable ignorance and want of skill, inflicted a wound on a child in the act of being born, and before it was born, and of which it died afterwards, was properly convicted of manslaughter.

tion will not lie at the suit of such child. The other judges concurred in separate opinions which are very interesting and instructive. The Massachusetts case and the Irish case have been followed where an action was brought on behalf of a child born with serious physical defects because of injuries sustained by its mother through the negligence of the officers of a hospital where she went for the purpose of being cared for during confinement.<sup>1</sup> An action will not lie to recover for the death of a child prematurely born, as the result of injuries to the mother, in consequence of which birth it died.<sup>2</sup> It is worthy of note in this connection that it has been held in England<sup>3</sup> that a child *en ventre sa mere* is a child within the meaning of Lord Campbell's act, so as to be capable, after its birth, of maintaining an action in respect of the pecuniary loss sustained by the death of its father owing to the wrongful act of others done while it was in the womb.

<sup>1</sup> *Allaire v. St. Luke's Hospital*, 184 Pac. Rep. 1021, 28 Am. St. 72, 16 L. R. Ill. 359, 56 N. E. Rep. 638, 75 Am. St. A. 808. See *Lathrope v. Flood*, 135 176, 48 L. R. A. 225, affirming 76 Ill. Cal. 458, 67 Pac. Rep. 683, 57 L. R. A. App. 441. 215.

<sup>2</sup> *Gorman v. Budlong*, — R. I. —, <sup>3</sup> *The George and Richard*, L. R. 3 49 Atl. Rep. 704; *Hawkins v. Front Ad. & Eccl.* 466. Street Cable R. Co., 3 Wash. 592, 28

## CHAPTER II.

## NOMINAL DAMAGES.

§ 9. Nature and purpose of nominal damages.

10. Illustrations of the right to nominal damages.

11. The right a substantial one; new trials.

[9] § 9. Nature and purpose of nominal damages. For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Rights are legal when recognized and protected by law. Every invasion of such right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence,—a legal injury; this entitles the injured party to compensation. In abstract principle the law is that the person whose rights have been invaded is entitled to compensation proportioned in amount to the injury. The extent of the actual injury, however, is seldom matter of law; and when it is not, merely showing the wrong or breach of contract which constitutes the injury, will only authorize the court to judicially declare that the party injured is entitled to *some* damages. If there is no inquiry as to actual damages, or none appear on inquiry, the legal implication of damage remains. This requires some practical expression as the compensation for a technical injury; therefore, nominal damages are given, as six cents, a penny, or a farthing, a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for damages generally specify a small sum which may be paid.<sup>1</sup> When actual damages are assessed

<sup>1</sup> Clay v. Board, 85 Mo. App. 237, citing the text; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Trumbull v. School District, 22 Wash. 631, 61 Pac. Rep. 714; Greensboro v. McGibboney, 93 Ga. 672, 20 S. E. Rep. 37; Jurnick v. Manhattan Optical Co., 66 N. J. L. 380, 49 Atl. Rep. 681; Douglass v. Railroad Co., 51 W. Va. 523, 41 S. E. Rep. 911; Diana Shoot-

ing Club v. Lamoreux, 114 Wis. 44, 58, 89 N. W. Rep. 880, citing the text; Bourdette v. Sieward, 107 La. 258, 31 So. Rep. 630; Beaumont v. Greathead, 2 C. B. 499; Ashby v. White, 2 Ld. Raym. 938; Parker v. Griswold, 17 Conn. 303; Ripka v. Sergeant, 7 W. & S. 9, 42 Am. Dec. 214; McConnel v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Pleasants v. North Beach, etc.

those which are nominal are included and are not separately added. Where a plaintiff sued in an inferior court for a debt of 50%, which was the extent of its jurisdiction, and neither recovered nor sought to recover damages except for the purpose of obtaining costs, it was held that nominal damages for this purpose did not place the debt beyond the jurisdiction.<sup>1</sup> Where judgment by default was taken on a bond in the penalty of \$250, conditioned to pay \$150, it was held that nominal damages could not be added to the penalty for detention of the debt to affect costs.<sup>2</sup> The theory upon which and the purpose for which such damages are awarded do not entitle

R. Co., 34 Cal. 586; Tootle v. Clifton, 22 Ohio, 247, 10 Am. Rep. 732; Pastorius v. Fisher, 1 Rawle, 27; Hobson v. Todd, 4 T. R. 71; Clifton v. Hooper, 6 Q. B. 468; Foster v. Elliott, 33 Iowa, 216; Leeds v. Metropolitan Gas L. Co., 90 N. Y. 26; Anders v. Ellis, 87 N. C. 207; Hill v. Forkner, 76 Ind. 115.

If there is no substantial right involved a judgment awarding \$1 as damages will not be reversed because some smaller sum would have been sufficient. Hill v. Forkner, 76 Ind. 115; Moe v. Chesrown, 54 Minn. 118, 55 N. W. Rep. 832; Hogan v. Peterson, 8 Wyo. 549, 564, 59 Pac. Rep. 162. *Contra*, White v. Woodruff, 25 Neb. 797, 806, 41 N. W. Rep. 785.

"Nominal damages mean in law some small amount sufficient to cover and carry the costs." Ransome v. Christian, 56 Ga. 351; Conley v. Arnold, 93 Ga. 823, 20 S. E. Rep. 762.

An award of \$25 as nominal damages has been sustained (Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741); but it was otherwise when the instruction was to find \$1 or any nominal sum. Trumbull v. School District, 22 Wash. 631, 61 Pac. Rep. 714.

In the exercise of equity powers in an action to recover for the death of a child, the plaintiff having had

reason to ask judicial investigation of the facts, the court awarded "nominal damages at \$250." Hamilton v. Morgan's L. & T. R. & S. Co., 42 La. Ann. 824, 8 So. Rep. 586.

In Bourdette v. Sieward, 107 La. 258, 31 So. Rep. 630, \$500 seems to have been considered nominal damages.

There appears to be a tendency in some states to treat the question of nominal damages otherwise than seriously. No doubt there are cases in which no injustice results from so doing. As has been observed by a court of high standing: When we consider that the doctrine of *res judicata*, or even the title to property, may rest upon a judgment for nominal damages, it is evident that the right to a verdict is not controlled by the incidental question of the amount of damages to be recovered. New Jersey School & Church Furniture Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. Rep. 397. See Chicago West Division R. Co. v. Metropolitan West Side E. R. Co., 152 Ill. 519, 38 N. E. Rep. 736; Dady v. Condit, 188 Ill. 234, 58 N. E. Rep. 900; Stanton v. New York & E. R. Co., 59 Conn. 272, 21 Am. St. 110, 22 Atl. Rep. 300.

<sup>1</sup> Joule v. Taylor, 7 Ex. 58.

<sup>2</sup> People v. Hallett, 4 Cow. 67.

the defendant who seeks, under a plea of recoupment, to reduce the claim of the plaintiff, arising under a contract, by nominal damages, in consequence of some breach of the same contract by the plaintiff.<sup>1</sup>

The damages which the law thus infers from the infraction of a legal right are absolute; they cannot be controverted; they are the necessary consequent. The act complained of may produce no actual injury; it may be in fact beneficial, by adding to the value of property or by averting a loss which would otherwise have happened; yet it will be equally true, in law and in fact, that it was in itself injurious if violative of a legal right. The implied injury is from that circumstance; the fact that beyond violating a right it was not detrimental, or was even advantageous, is immaterial to the legal quality of the act itself.<sup>2</sup>

### § 10. Illustrations of the right to nominal damages.

A message containing a direction to purchase a specified quantity of wheat, deliverable at a stated time in the future, was furnished a telegraph company for transmission. The message, by negligence of the company's servants, was not de-

<sup>1</sup> Foote & Davis Co. v. Malony, 115 Ga. 985, 42 S. E. Rep. 413.

<sup>2</sup> Jewett v. Whitney, 43 Me. 242; Cook v. Hull, 3 Pick. 269, 15 Am. Dec. 208; Bolivar Manuf. Co. v. Neponset Manuf. Co., 16 Pick. 246; Stowell v. Lincoln, 11 Gray, 434; Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167; Pollard v. Porter, 3 Gray, 312; Newcomb v. Wallace, 112 Mass. 25; Chamberlain v. Parker, 45 N. Y. 569; Marzetti v. Williams, 1 B. & Ad. 415; Kimel v. Kimel, 4 Jones, 121; Warre v. Calvert, 7 Ad. & El. 143; Embrey v. Owen, 6 Ex. 353; Northam v. Hurley, 1 El. & Bl. 665; Medway Nav. Co. v. Romney, 9 C. B. (N. S.) 575; McLeod v. Boulton, 3 Up. Can. Q. B. 84; Smith v. Whiting, 100 Mass. 122; McConnel v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Barker v. Green, 2 Bing. 317; Graver v. Sholl, 42 Pa. 58; Chapman v. Thames Manuf. Co., 13 Conn. 269, 33 Am. Dec. 401; Tyler v.

Wilkinson, 4 Mason, 397; Bealey v. Shaw, 6 East, 208; Blodgett v. Stone, 60 N. H. 167; Fulkerson v. Eads, 19 Mo. App. 623; Adams v. Robinson, 65 Ala. 586; Drum v. Harrison, 83 Ala. 384, 3 So. Rep. 769; Barlow v. Lowder, 35 Ark. 492; Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406, 7 Pac. Rep. 810; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. Rep. 618; Kenney v. Collier, 79 Ga. 743, 8 S. E. Rep. 58; Brant v. Gallup, 111 Ill. 487, 53 Am. Rep. 638; Mize v. Glenn, 38 Mo. App. 98; Jones v. Hannovan, 55 Mo. 462; Trammell v. Chambers County, 93 Ala. 388, 9 So. Rep. 815; Treadwell v. Tillis, 108 Ala. 262, 18 So. Rep. 886; Patrick v. Colorado Smelting Co., 20 Colo. 268, 38 Pac. Rep. 236; New-Jersey School & Church Furniture Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. Rep. 397. See cases cited in notes 1, 2, § 2.

livered. The market price of wheat advanced for two days, then fluctuated, and was less on the day specified in the message than on the day when it should have been delivered, so that there was not only no damage, but the sender was saved from the loss which he would have suffered if his message had been delivered and acted upon. But there was a neglect of duty, an infraction of the sender's right to have care and diligence used in the transmission and delivery of his message; for that he was entitled to nominal damages.<sup>1</sup> The plaintiff and the defendants were riparian proprietors on a water-course, and had mills thereon; various other mills belonging to third persons were located on the same stream. In case, the plaintiff complained that the defendants heated the water of the stream by operating steam boilers in their mills, increasing the evaporation five per cent., which was to that extent an abstraction of the water; also that they fouled the water by discharging into it soap suds, etc. But the pollution did no actual damage to the plaintiff, because the water was already so polluted by similar acts of other mill owners and dyers above the defendants' mill that the latter's acts made no appreciable difference; that is, the pollution by the defendants did not make the stream less applicable to practical purposes than it was before. It was held, however, that the plaintiff received damage in point of law from such pollution. It was an injury to a right; but that the loss of five per cent. would not give a cause of action if such diminution arose from a reasonable use of the stream.<sup>2</sup> Where a part owner was expelled from a mill property, and while wrongfully kept out of possession, the mill, which was old, was replaced by a new one of greater value, so that when he regained possession the property was much more valuable, and he was a gainer after deducting all intermediate lost profits, he was entitled to nominal damages.<sup>3</sup>

<sup>1</sup> Hibbard v. Western U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775. Nominal damages may be recovered for such negligence though it does not appear that anything was paid for sending the telegram. Kennon v. Western

U. Tel. Co., 92 Ala. 399, 9 So. Rep. 200.

<sup>2</sup> Wood v. Waud, 3 Ex. 748; Uibricht v. Eufaula Water Co., 86 Ala. 587, 11 Am. St. 67, 6 So. Rep. 78, 4 L. R. A. 572.

<sup>3</sup> Jewett v. Whitney, 43 Me. 242.

The principle that for the violation of every legal right nominal damages at least will be allowed applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property. The offer of violence to a person is an assault, and the least unjustifiable touching of him a battery. Where a debtor was arrested on a *ca. sa.*, and judgment, after an insolvent discharge, which gave him immunity from arrest, it was held that the party at whose [12] instance the writ was issued, as well as the attorney who issued it, were liable for false imprisonment whether they were previously notified of the discharge or not. Want of notice might reduce the damages to a nominal sum, but could not be allowed to absolutely excuse a trespass.<sup>1</sup> The death of a child was caused by the neglect or unskilfulness of defendant's clerk in substituting morphine for quinine. As the child could have brought an action for the injury had he survived, it was held that a liability under a statute of New York existed in favor of the administrator; and because the statute expressly gave a right of action, at least nominal damages were recoverable.<sup>2</sup> In actions for libel and slander, wherever there has been publication of matter in itself libelous or actionable *per se*, the law infers some damage.<sup>3</sup> Every unauthorized entry upon land of another or intermeddling with his goods is an actionable trespass, whether there be actual injury or not; whether the owner suffer much or little, he is entitled to a verdict for some damages.<sup>4</sup> In an action for fishing in the

<sup>1</sup> *Deyo v. Van Valkenburgh*, 5 Hill, 242. See *Flint v. Clark*, 13 Conn. 361.

<sup>2</sup> *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. New York Central R. Co.*, 43 Barb. 532; *Ihl v. Forty-second Street, etc. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450.

The failure to comply with a statute requiring that, at stated times, the officers of a corporation shall file verified accounts necessarily implies an injury to the stockholders though no actual damages be shown; and neither the recovery of judgment nor the pendency of an action for a past default bars a subsequent ac-

tion for a default which occurred after commencement of the prior action., *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. Rep. 399. Where the law gives an action for the doing of an act, the doing thereof imports a damage. *Whittemore v. Cutter*, 1 Gall. 429, 433. See *Enos v. Cole*, 53 Wis. 235, 10 N. W. Rep. 377.

<sup>3</sup> *Ashby v. White*, 1 Salk. 19, 2 Ld. Raym. 955; *Flint v. Clark*, 13 Conn. 361; *Kelly v. Sherlock*, L. R. 1 Q. B. 636.

<sup>4</sup> *Dixon v. Clow*, 24 Wend. 188; *McAneany v. Jewett*, 10 Allen, 151; *Carter v. Wallace*, 2 Tex. 206; *Plum-*

plaintiff's several fishery, he was held entitled to nominal damages though the defendant took no fish and the declaration did not allege that he caught any.<sup>1</sup> One's right of property is infringed by any unlawful flowage of his land.<sup>2</sup> A riparian owner has a right to the natural flow of water not increased or diminished in quantity, and unpolluted in quality, and for [13] any infraction of this right at least nominal damages may be recovered.<sup>3</sup> A fraud by which one is drawn into a contract is an injury actionable *per se*.<sup>4</sup> Actual damage is not necessary to an action. A violation of a right with the possibility of damage is sufficient ground.<sup>5</sup>

**§ 11. The right a substantial one; new trials.** The failure to perform a duty or contract is a legal wrong independently of actual damage to the party for whose benefit the per-

mer v. Harbut, 5 Iowa, 308; Coe v. Peacock, 14 Ohio St. 187; Pierce v. Hosmer, 66 Barb. 345; White v. Griffin, 4 Jones, 139; Watson v. New Milford Water Co., 71 Conn. 442, 42 Atl. Rep. 265.

<sup>1</sup> Patrick v. Greenway, 1 Saund. 346b, note.

<sup>2</sup> Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53; McCoy v. Danley, 20 Pa. 89; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Kemmerrer v. Edelman, 23 Pa. 143; Warren v. Deslippe, 33 Up. Can. Q. B. 59; Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; Pastorius v. Fisher, 1 Rawle, 27; Whipple v. Cumberland Manuf. Co., 2 Story, 661; Jones v. Hannovan, 55 Mo. 462; Doud v. Guthrie, 13 Ill. App. 653; Mellor v. Pilgrim, 7 id. 306; Mize v. Glenn, 38 Mo. App. 98.

<sup>3</sup> New York Rubber Co. v. Rothery, 132 N. Y. 293, 28 Am. St. 575, 30 N. E. Rep. 841; Newhall v. Gilson, 8 Cush. 595; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 365; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Holsman v. Boiling Spring B. Co., 14 N. J. Eq. 335; Embrey v. Owen, 6 Ex. 353; Northam v. Hurley, 1 El. & Bl. 665;

Stockport Water Works Co. v. Potter, 7 H. & N. 160; Tyler v. Wilkinson, 4 Mason, 397; Wood v. Waud, 3 Ex. 748; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301; Munroe v. Stickney, 48 Me. 462; Mitchell v. Barry, 26 Up. Can. Q. B. 416; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453.

<sup>4</sup> Allaire v. Whitney, 1 Hill, 484; Ledbetter v. Morris, 3 Jones, 543; Pontifex v. Bignold, 3 Scott N. R. 390.

<sup>5</sup> Id.; National Exchange Bank v. Sibley, 71 Ga. 726, 734; Ross v. Thompson, 78 Ind. 90; Hooten v. Barnard, 137 Mass. 36; Blodgett v. Stone, 60 N. H. 167; Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. Rep. 814.

Mr. Justice Story observed in Webb v. Portland Manuf. Co., 3 Sumner, 189, that actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party is entitled to maintain his action in vindication of his right.



formance of such duty or contract is due.<sup>1</sup> The omission to show actual damages and the inference therefrom that none have been sustained do not necessarily render the case trivial. The law has regard for the substantial rights of parties though it may overlook trivial things.<sup>2</sup> When such a right is violated the maxim *de minimis non curat lex* has no application.<sup>3</sup> The court will add nominal damages to the finding of a jury when necessary to such rights, as to carry costs.<sup>4</sup> So where [14-16] judgment should have been given for plaintiff for nominal damages, but was rendered for defendant, it will be reversed if such damages will entitle the plaintiff to costs;<sup>5</sup> otherwise a

<sup>1</sup> Spafford v. Goodell, 3 McLean, 97; Runlett v. Bell, 5 N. H. 433; Hagan v. Riley, 13 Gray, 515; Pond v. Merri-field, 12 Cush. 181; Bagby v. Harris, 9 Ala. 173; Clinton v. Mercer, 3 Murph. 119; Conger v. Weaver, 20 N. Y. 140; Mecklem v. Blake, 22 Wis. 495; Freese v. Crary, 29 Ind. 525; Worth v. Edmonds, 52 Barb. 40; French v. Bent, 43 N. H. 448; Johnson v. Stear, 15 C. B. (N. S.) 330; Steer v. Crowley, 14 id. 337; Brown v. Emerson, 18 Mo. 103; Laflin v. Willard, 16 Pick. 64; Goodnow v. Willard, 5 Met. 517; Browner v. Davis, 15 Cal. 9; Seat v. Moreland, 7 Humph. 575; Bond v. Hilton, 2 Jones, 149; Craig v. Chambers, 17 Ohio St. 254; Dow v. Humbert, 91 U. S. 294; Smith v. Whiting, 100 Mass. 122; Blot v. Boiceau, 3 N. Y. 78; Hickey v. Baird, 9 Mich. 32; Newcomb v. Wallace, 112 Mass. 25; Chamberlain v. Parker, 45 N. Y. 569; Wilcox v. Executor of Plummer, 4 Pet. 172; Clark v. Smith, 9 Conn. 379; Barker v. Green, 2 Bing. 317; Pollard v. Porter, 3 Gray, 312; Marzetti v. Williams, 1 B. & Ad. 415; Jordan v. Gallup, 16 Conn. 536; Cooper v. Wolf, 15 Ohio St. 523; Mickles v. Hart, 1 Denio, 548; Carl v. Granger Coal Co., 69 Iowa, 519, 29 N. W. Rep. 437; Rosser v. Timberlake, 78 Ala. 162.

<sup>2</sup> Smith v. Gugerty, 4 Barb. 614;

Hathorne v. Stinson, 12 Me. 183; Stowell v. Lincoln, 11 Gray, 434; Kimel v. Kimel, 4 Jones, 121; Elliottville, etc. Plank R. Co. v. Buffalo, etc. R. Co., 20 Barb. 644.

The Georgia court is not aware of any precedent authorizing a trial court to deprive a plaintiff of his right to recover nominal damages. To so hold would put it in the power of the court to prevent the recovery thereof, and render the law authorizing it inoperative. Addington v. Western & A. R. Co., 93 Ga. 566, 20 S. E. Rep. 71. Hence if the right to recover such damages is shown, a judgment directing a verdict for the defendant will be reversed. *Id.* And so of a judgment sustaining a demurrer to the petition, only nominal damages being recoverable. Kenny v. Collier, 79 Ga. 743, 8 S. E. Rep. 58; Sutton v. Southern R. Co., 101 Ga. 776, 29 S. E. Rep. 53; and a judgment dismissing the action. Roberts v. Glass, 112 Ga. 456, 37 S. E. Rep. 704.

<sup>3</sup> Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. Rep. 356, 18 L. R. A. 44.

<sup>4</sup> Von Schoening v. Buchanan, 14 Abb. Pr. 185.

<sup>5</sup> Potter v. Mellen, 36 Minn. 122, 30 N. W. Rep. 438; Enos v. Cole, 53 Wis. 235, 10 N. W. Rep. 377; Sayles v. Bemis, 57 Wis. 315, 15 N. W. Rep. 432; Eaton v. Lyman, 30 Wis. 41.

judgment which is erroneous only because it fails to award plaintiff nominal damages will not be reversed,<sup>1</sup> nor will a new trial be granted.<sup>2</sup> If the reviewing court recognizes that substantial damages have been sustained and that the party entitled to them mistook the basis on which they should be determined, the denial of his right to nominal damages, to which he was entitled, will be ground for reversing the judgment.<sup>3</sup> And if the object of the action is to determine some question of permanent right, and through error the plaintiff is deprived of the judgment he is entitled to, the fact that he can recover only nominal damages will not be reason for de-

<sup>1</sup> *Hickey v. Baird*, 9 Mich. 32; *Robertson v. Gentry*, 2 Bibb, 542; *Watson v. Van Meter*, 43 Iowa, 76; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. Rep. 174; *Ely v. Parsons*, 55 Conn. 83, 101, 10 Atl. Rep. 499; *Platter v. Seymour*, 86 Ind. 323; *Rhine v. Morris*, 96 Ind. 81; *Norman v. Winch*, 65 Iowa, 263, 21 N. W. Rep. 598; *Harris v. Kerr*, 37 Minn. 537, 35 N. W. Rep. 379; *Hibbard v. Western U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Benson v. Waukesha*, 74 Wis. 31, 41 N. W. Rep. 1017; *Beatty v. Oille*, 12 Can. Sup. Ct. 706; *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. Rep. 931; *Haven v. Manuf. Co.*, 40 Mich. 286; *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479, 56 N. W. Rep. 68; *Thisler v. Hopkins*, 85 Ill. App. 207; *People v. Petrie*, 94 id. 652; *Coffin v. State*, 144 Ind. 578, 43 N. E. Rep. 654, 55 Am. St. 188; *Smith v. Parker*, 148 Ind. 127, 45 N. E. Rep. 770; *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. Rep. 521; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. Rep. 343; *United States Exp. Co. v. Koerner*, 65 Minn. 540, 68 N. W. Rep. 181, 33 L. R. A. 600; *Kenyon v. Western U. Tel. Co.*, 100 Cal. 454, 35 Pac. Rep. 75, quoting the text; *Phillips v. Covell*, 79 Hun, 210, 29 N. Y. Supp. 613; *Roberts v. Minneapolis Threshing M. Co.*, 8 S. D. 579, 67 N. W. Rep. 607; *Ternes v. Dunn*, 7 Utah, 497, 27 Pac. Rep. 692; *Farr v. State Bank*, 87

Wis. 223, 58 N. W. Rep. 377, 41 Am. St. 40; *East Moline Co. v. Weir Plow Co.*, 37 C. C. A. 62, 95 Fed. Rep. 250; *Kelly v. Fahrney*, 38 C. C. A. 103, 105, 97 Fed. Rep. 176; *Scammell v. Clark*, 31 N. B. 250; *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. Rep. 379; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. Rep. 437; *Hartmann v. Burtis*, 65 App. Div. 481, 72 N. Y. Supp. 914; *Briggs v. Cook*, 99 Va. 273, 38 S. E. Rep. 148.

If the judgment is reversed because of error in the instructions the appellate court will direct judgment for a nominal sum for the plaintiff, it being clear that he is entitled to nominal damages. *Jones v. Telegraph Co.*, 101 Tenn. 442, 47 S. W. Rep. 699.

<sup>2</sup> *Id.*; *Brantingham v. Fay*, 1 Johns. Cas. 256; *Jennings v. Loring*, 5 Ind. 250; *Watson v. Hamilton*, 6 Rich. 75; *Haines v. Dunlap*, 33 N. B. 556; *Ringlehaupt v. Young*, 55 Ark. 128, 17 S. W. Rep. 710.

Costs are not taxed in the court of claims, and it is not in accordance with the practice of that court to render a judgment for nominal damages. *Friedenstein v. United States*, 35 Ct. of Cls. 1, 9.

<sup>3</sup> *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 94, 39 N. E. Rep. 7.

nying a new trial.<sup>1</sup> If the right to such damages is established the court cannot ignore it and give the defendant judgment although the jury erroneously find substantial damages in the plaintiff's favor.<sup>2</sup> A cause of action may be so intrinsically trivial and vexatious that it would be almost a pardonable departure from the technical rule to apply the maxim *de minimis non curat lex* and direct a verdict for the defendant. It was so ruled in a Vermont case. The defendant as an officer had attached certain hay, straw, etc., and used a pitchfork belonging to the debtor in removing the same; he did no injury to the fork, and after its use returned it where he found it. The court held there was no liability.<sup>3</sup> It is to be observed that, though there was a technical wrong, by an unauthorized intermeddling with another's property, there was no assertion of an adverse right and no actual injury. The action was not necessary for the vindication of a right nor to redress a wrong deserving compensation. It was, however, a case in which, upon strict principles, nominal damages should have been given; for they are always due for the positive and wrongful invasion of another's property.<sup>4</sup> Technical rules and rules as to the forms of proceedings must be observed without regard to the consequences which may follow in particular cases; otherwise the stability of judicial decisions and the certainty of the law cannot be preserved.<sup>5</sup>

<sup>1</sup> Merrill v. Dibble, 12 Ill. App. 85; Ely v. Parsons, 55 Conn. 83, 101, 10 Atl. Rep. 499; Skinner v. Allison, 54 App. Div. 47, 66 N. Y. Supp. 288; Olson v. Huntimer, 8 S. D. 220, 66 N. W. Rep. 313; Bungenstock v. Nishnabotna Drainage District, 163 Mo. 198, 64 S. W. Rep. 149.

<sup>2</sup> Carl v. Granger Coal Co., 69 Iowa, 519, 29 N. W. Rep. 437.

<sup>3</sup> Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Pronk v. Brooklyn Heights R. Co., 68 App. Div. 390, 74 N. Y. Supp. 375.

<sup>4</sup> Seneca Road Co. v. Auburn, etc. R. Co., 5 Hill, 175; Heater v. Pearce, 59 Neb. 583, 81 N. W. Rep. 615, citing the text.

<sup>5</sup> Clark v. Swift, 3 Met. 390, 395.

In Fullam v. Stearns, 30 Vt. 443, it

was said that whenever the maxim *de minimis non curat lex* is applied to take away a right of recovery, it has reference to the injury and not to the resulting damage. The opinion of Bennett, J., in that case states the result of several cases on this proposition. See *Ashby v. White*, 2 Ld. Raym. 938; *Kidder v. Barker*, 18 Vt. 454; *Clifton v. Hooper*, 6 Q. B. 468; *Barker v. Green*, 2 Bing. 317; *Williams v. Mostyn*, 4 M. & W. 145; *Cady v. Huntington*, 1 N. H. 138; *Young v. Spencer*, 10 B. & C. 145; *Embrey v. Owen*, 6 Ex. 353, 372; *Williams v. Esling*, 4 Pa. 486, 45 Am. Dec. 710; *Glanvill v. Stacey*, 6 B. & C. 543; *Seneca Road Co. v. Auburn, etc. R. Co.*, 5 Hill, 175; *Bustamente v. Stewart*, 55 Cal. 115.

## CHAPTER III.

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## SECTION 1.

### COMPENSATORY DAMAGES.

#### § 12. Award of compensation the object of the law.

[17] Actions at law are usually brought to recover compensation for the wrong complained of. The law which is denominated the law of damages is principally that which defines, measures and awards compensation. Such damages as are not compensatory are either nominal or exceptional. Compensation is the redress which the law affords to all persons whose rights have been invaded; in the nature of things they must accept that by way of reparation. Therefore the principles which underlie this right, so necessary and so frequently invoked, and the rules which govern its enforcement, are of the greatest importance. The law defines very precisely all personal and property rights so that every person may enjoy his own with confidence and repose. If they are infringed the extent of the encroachment is readily seen when the facts appear. The law defines the scope of responsibility with as much precision as the nature of the subject will permit, and lays down a universal measure of recompense for civil injury which the sufferer is entitled to recover, and the person who is liable is bound to pay, when the injury has been done without a motive for which the law subjects him to punishment. The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs.<sup>1</sup> It is not within legislative power to deprive an

<sup>1</sup> *Rockwood v. Allen*, 7 Mass. 254; *Ferrer v. Beale*, 1 Ld. Raym. 692; *Dexter v. Spear*, 4 Mason, 115; *Allison v. Chandler*, 11 Mich. 542; *Walker v. Smith*, 1 Wash. C. C. 153; *Northrup v. McGill*, 27 Mich. 234;

individual who has been injured in his person or estate of redress either in whole or in part. "Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person fills the measure secured to him in the declaration of rights."<sup>1</sup> The principle of just compensation is paramount. By it all rules [18] on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception. There are, however, upon certain subjects some arbitrary rules, or those which have been adopted from considerations of policy, ostensible on the basis of compensation, which really fall short of that object in a conservative deference to possible consequences to the party who must respond to the demand. With these necessary or expedient exceptions, the person who has broken his contract or caused injury by any tortious act is liable to the other party to the contract or to the sufferer from such act for such damages as will place the person so injured in as good condition as though the contract had been performed or the tort

*Bussy v. Donaldson*, 4 Dall. 206; *Griffin v. Colver*, 16 N. Y. 494; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Baker v. Drake*, 53 N. Y. 216; *United States v. Smith*, 94 U. S. 214; *Robinson v. Harman*, 1 Ex. 850; *Peltz v. Eichele*, 62 Mo. 171; *Noble v. Ames Manuf. Co.*, 112 Mass. 492; *Buckley v. Buckley*, 12 Nev. 423; *Suydam v. Jenkins*, 3 Sandf. 614; *Parker v. Simonds*, 8 Met. 205; *Jacobson v. Poindexter*, 42 Ark. 97; *Goodbar v. Lindsley*, 51 Ark., 380, 14 Am. St. 54, 11 S. W. Rep. 577; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Jones v. People*, 19 Ill. App. 300; *Page v. Sumpter*, 53 Wis. 652, 11 N. W. Rep. 60; *Henson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. Rep. 129, citing the preceding sentence of the text;

*Horst v. Roehm*, 84 Fed. Rep. 565; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

A charge on the subject of damages is objectionable if the jury are told that plaintiff is entitled to "full, complete and ample" compensation. The adjectives should not be used. *Sale v. Eichberg*, 105 Tenn. 332, 352, 59 S. W. Rep. 1020.

To say to the jury that the plaintiff's damages may be assessed at such sum as they may think he has sustained is to give them a "roving commission" to apply their own measure of damages instead of that defined by the law. *Camp v. Wabash R. Co.*, 94 Mo. App. 272. See § 1256.

<sup>1</sup> *Thirteenth & F. St. P. R. v. Boudrou*, 92 Pa. 475, 482.

had not been committed. It is not meant by this that the party liable must answer for all consequences which may indirectly and remotely ensue. The latter are, beyond a certain point, incapable of being traced; they combine with the results of other causes, and any attempt to follow and apportion them would be abortive, and any conclusion of liability based upon such consequences would rest on conjecture and lead to great injustice. If men were held to such a far-reaching responsibility they would be timid or reckless; if it were legally recognized it would be fatal to all activity and enterprise.

§ 13. **Limitation of liability to natural and proximate consequences.** As before remarked, the law defines the scope of responsibility for consequences; beyond that they are supposed to cease or the injured party is presumed to counteract them by preventive measures. The legal scope is a reasonable one; in general it extends as far as the moral judgment and practical sense of mankind recognize responsibility in the domain of morals, and in those affairs of life which are not referred to the courts for regulation or adjustment. The law [19] defines it generally by the principle which limits the recovery of damages to those which *naturally* and *proximately* result from the act complained of; or, in other words, to those consequences of which the act complained of is the natural and proximate cause. This limitation is expressed in such general terms that the distinction between those damages which are compensable and those which, because being too remote, are not, is not always very clear. On similar facts different courts have come to diverse conclusions, though equally acknowledging the principle. It is made more specific, however, by rules of an elementary character formulated under it, and by judicial exposition and illustrations which impart to this legal generality a more precise and determinate import than is suggested by its words; and it is only by resort to them that the principle of this limitation can be definitely understood, explained or elucidated. Damages which are recoverable may, therefore, be conveniently divided primarily for this purpose into two classes: first, direct; second, consequential.



## SECTION 2.

## DIRECT DAMAGES.

§ 14. **What these include.** These include damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegation of damages in the declaration, but also other direct effects which have in the particular instance naturally ensued, and must be alleged specially to be recovered for. The liability of the defendant for these, if responsible for the cause, is clear. All such damages, whether for tort or breach of contract, are recoverable without regard to his intention or motive, or any previous actual contemplation of them. A defendant is conclusively presumed to have contemplated the damages which result directly and necessarily or naturally from his breach of contract,<sup>1</sup> as will be more particularly illustrated in another place; and in [20] cases of tort his responsibility to this extent is absolute.<sup>2</sup> An illustration of this rule is found in a case in Virginia where an administrator sold a chattel which the intestate had in his possession when he died, but which in truth belonged to another, and applied the proceeds to the payment of the debts of the intestate, in due course of administration, without notice of the right or claim of the owner; he was held personally liable to such owner for the value of the property.<sup>3</sup> In a Massachusetts case a factor bought goods for his principal residing at W., and by mistake sent them to a third person at S., who received them in good faith and paid the freight; he was held liable for the goods to the owner, but was allowed a deduction for the freight paid.<sup>4</sup>

<sup>1</sup> Hadley v. Baxendale, 9 Ex. 341; Burrell v. New York, etc. Co., 14 Mich. 34; Brown v. Foster, 51 Pa. 165; Collard v. Southeastern R. Co., 7 H. & N. 79; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Smith v. St. Paul, etc. R. Co., 30 Minn. 169, 14 N. W. Rep. 797; Agius v. Great Western Colliery Co., [1899] 1 Q. B. 413; Cole v. Stearns, 20 N. Y. Misc. 502, 46 N. Y. Supp. 238.

<sup>2</sup> Cogdell v. Yett, 1 Cold. 230; Tally

v. Ayres, 3 Sneed, 677; Bowas v. Pioneer Tow Line, 2 Sawyer, 21; Perley v. Eastern R. Co., 98 Mass. 414; Lane v. Atlantic Works, 111 Mass. 136; Martachowski v. Orawitz, 14 Pa. Super. Ct. 175, 186, citing the text. See chs. 21, 22, 36; Lathers v. Wyman, 76 Wis. 616, 45 N. W. Rep. 669.

<sup>3</sup> Newsum v. Newsum, 1 Leigh, 86, 19 Am. Dec. 739.

<sup>4</sup> Whitney v. Beckford, 105 Mass. 267; Eten v. Luyster, 60 N. Y. 252;

## SECTION 3.

## CONSEQUENTIAL DAMAGES FOR TORTS.

**§ 15. Awarded for probable consequences.** Consequential damages are those which the cause in question naturally, but indirectly, produced. An example: the defendant was liable for killing a mare; the plaintiff suffered injury in the loss of that animal to the extent of her value, but circumstances gave her an additional value to him; she had an unweaned colt, and was suckling the colt of another mare which had died. The direct consequence of the killing of the mare was her loss—the necessity of employing other means to raise the colts was consequential.<sup>1</sup> The consequential damages which may be recovered are governed by one consideration when they are claimed for a tort, and by another when they are sued for as the result of a breach of contract. The latter will be the subject of the next section. The question of the remoteness of damage, if the material facts are not in dispute, is for the court. Blackburn, J., has said that it never ought to be left to a jury; to do that would be in effect to say that there shall be no rule as to damages being too remote.<sup>2</sup>

**[21] § 16. Rule of consequential damages for torts.** In an action for a tort, if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances; such as, according to common experience and the usual course of events, might have been reasonably anticipated. The damages are not limited or affected, so far as they are com-

Keenan v. Cavanagh, 44 Vt. 288; Little v. Boston, etc. R. Co., 66 Me. 239; Bowas v. Pioneer Tow Line, 2 Sawyer, 21.

<sup>1</sup> Teagarden v. Hetfield, 11 Ind. 522.

<sup>2</sup> Hobbs v. London & S. R., L. R. 10 Q. B. 111, 122; Hammond v. Bussey, 20 Q. B. Div. 79, 89; Read v. Nichols, 118 N. Y. 224, 23 N. E. Rep. 468, 7 L. R. A. 130; Cuff v. Newark, etc. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Behling v. Southwest Pipe Lines, 160 Pa. 359, 28 Atl. Rep. 777, 40 Am. St.

724; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep. 400, 11 C. C. A. 253, 27 L. R. A. 583; Pennsylvania Co. v. Whitlock, 99 Ind. 16, 50 Am. Rep. 71; Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N. E. Rep. 1, 41 L. R. A. 794; Deisenrieter v. Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. Rep. 735; Consolidated Electric Light & P. Co. v. Koepp, 64 Kan. 735, 67 Pac. Rep. 608. *Contra*, Gulf, etc. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. Rep. 944, 47 L. R. A. 325.

pensatory, by what was in fact in contemplation by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. Whether the injurious consequences may have been 'reasonably expected' to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. Such reasonable expectation bears more clearly upon the intent with which the act was committed than upon the liability of the doer for the injurious consequences. If he might reasonably have expected that the injurious consequences which did flow from the act would flow from its commission, the *prima facie* legal presumption would be that he intended the consequences, and the action should be trespass rather than case. It is the unexpected rather than the expected that happens in the great majority of the cases of negligence."<sup>1</sup> Mr. Wharton says that a man may be negligent in a particular matter "a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defense that a particular injurious consequence is 'improbable,' and 'not to be reasonably expected,' if it really appear that it naturally followed from the negligence under examination."<sup>2</sup> Continuing, the

<sup>1</sup> *Stevens v. Dudley*, 56 Vt. 158, 166.

"When negligence is established it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule care must be taken to distinguish between what is negligence and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider

what a prudent man might reasonably have anticipated, but when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability." *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. Rep. 585, 67 Am. St. 691, 45 L. R. A. 87. Compare *Renner v. Canfield*, 36 Minn. 90, 30 N. W. Rep. 435.

<sup>2</sup> Wharton on Neg., § 77, referring to *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *White v. Ballou*, 8 Allen, 408; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 523; *Lewis v. Smith*, 107 Mass. 334, and

same author says: "Nor, when we scrutinize the cases in which the test of 'reasonable expectation' is applied, do we find that the 'expectation' spoken of is anything more than an expectation that some such disaster as that under investigation will occur on the long run from a series of such negligences as those with which the defendant is charged."<sup>1</sup> This doctrine is fully approved by the supreme court of Vermont,<sup>2</sup> and is logically sustained by other recent adjudications in this country, some of which are cited in the preceding note; others will be referred to in the pages devoted to this branch of the law of damages.

The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action. All

several English cases. See, also, *Stevens v. Dudley*, 56 Vt. 158; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911; *Terre Haute & L. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Winkler v. St. Louis, etc. R. Co.*, 21 Mo. App. 99; *Evans v. Same*, 11 id. 463; *Baltimore City P. R. v. Kemp*, 61 Md. 74; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Ehrgott v. Mayor*, 96 N. Y. 264, 281, 48 Am. Rep. 622; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469; *Wygant v. Crouse*, 127 Mich. 158, 86 N. W. Rep. 527, 53 L. R. A. 626.

Where there was a fraudulent increase of the mortgage indebtedness of a corporation which had issued stock to the amount of \$21,000,000 from \$2,579,149 to \$4,299,000 and the value of the stock was depreciated \$6,580,000, it was held that such result was not to have been expected. *Rockefeller v. Merritt*, 22 C. C. A.

608, 76 Fed. Rep. 909, 35 L. R. A. 633. The test applied seems to indicate that the wrong-doer, even in a case of fraud, must anticipate, approximately at least, the extent of the injury his act may do. Such a rule would add another large element of uncertainty as to what constitutes proximate cause. It ought to be enough to make the wrong-doer liable for all the financial loss resulting from a fraudulent transaction if it appears that such loss, to any considerable extent, would be reasonably sure to follow.

The fact that the licensee of a barn which was torn down was obliged to sell his horses is not the natural and proximate result of the tortious act, but of his financial situation. *Chandler v. Smith*, 70 Ill. App. 658, citing the first edition of this work.

<sup>1</sup> § 78.

<sup>2</sup> *Stevens v. Dudley*, 56 Vt. 158.

persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. The lawfulness of their acts and the degree of care required of them depend upon this foresight.<sup>1</sup> An apt illustration of this principle is afforded by the rule of law which compels a person who is insane, unless his condition was caused by the unlawful violence of the plaintiff,<sup>2</sup> to make recompense for his

<sup>1</sup> Witham v. Cohen, 100 Ga. 670, 676, 28 S. E. Rep. 505, citing the text; Murdock v. Walker, 43 Ill. App. 590; Chicago, etc. R. Co. v. Mochell, 96 id. 178; Coy v. Indianapolis Gas Co., 146 Ind. 655, 663, 46 N. E. Rep. 17, 36 L. R. A. 535, quoting the major portion of the section; Licking Rolling Mill Co. v. Fischer, 8 Ky. L. Rep. 89, 95 (Ky. Super. Ct.); Hughes v. Austin, 12 Tex. Civ. App. 178, 184-5, 33 S. W. Rep. 607, citing the text; Hardaker v. Idle District Council, [1896] 1 Q. B. 335; McHugh v. Schlosser, 159 Pa. 480, 28 Atl. Rep. 291, 39 Am. St. 699, 23 L. R. A. 574; McPeck v. Western U. Tel. Co., 107 Iowa, 356, 78 N. W. Rep. 63, 70 Am. St. 205, 43 L. R. A. 214; Bradshaw v. Frazier, 113 Iowa, 579, 85 N. W. Rep. 752, 55 L. R. A. 258; Wallin v. Eastern R. Co., 83 Minn. 149, 86 N. W. Rep. 76. See McGowan v. Chicago, etc. R. Co., 91 Wis. 147, 154, 64 N. W. Rep. 891.

A person who places a man whom he has made helplessly drunk in charge of a horse is presumed to know that injury may result, because horses require management by persons who are possessed of mental and physical capacities. Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42; Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Bertholf v. O'Reilly, 8 Hun, 16, 74 N. Y. 509, 30 Am. Rep. 323; Aldrich v. Sager, 9 Hun, 537; Mulcahey v. Givens, 115 Ind. 286, 17 N. E. Rep. 598; Brink v. Kansas City, etc. R. Co., 17 Mo. App. 177, 199. See

Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39.

A man who is engaged to be married and who is examined by a physician employed by the father of his fiancée for the purpose of ascertaining whether he is diseased or not may maintain an action against the physician for a negligent diagnosis; the breaking of the marriage engagement is not too remote a damage. Harriott v. Plimpton, 166 Mass. 585, 44 N. E. Rep. 992.

One who negligently causes a fire which endangers property is bound to know that the owner of the property may take means to preserve it, and if, in doing so, he is personally injured, without negligence on his part, may recover for his injury. Berg v. Great Northern R. Co., 70 Minn. 272, 73 N. W. Rep. 648, 68 Am. St. 524.

A wife who endeavors to preserve her husband's property from a fire so set is not a mere volunteer, and the damage she sustains in so doing is not too remote to be recovered. Edwards v. Melbourne & M. Board of Works, 19 Vict. L. R. 432.

This measure of liability may be limited by statute, as under the Indian Depredation Act of 1891, which provided for the recovery of property "taken or destroyed;" claims for consequential damages were not recoverable. Price v. United States, 33 Ct. of Cls. 106.

<sup>2</sup> Jenkins v. Hankins, 98 Tenn. 545, 557, 41 S. W. Rep. 1028.

torts. This is rested, it is true, on grounds of public policy;<sup>1</sup> and the liability of all persons may be rested there as well as on the principles of natural justice. The injury, however, must proceed from and be caused by the wrongful act of the defendant; but the causation is not to be tested metaphysically or by any occult principles of science, but rather as persons of ordinary intelligence apprehend cause and effect. The law is practical, and courts do not indulge refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties.<sup>2</sup> Hence if the defendant's negligence greatly multiplied the chances of accident, and was of a character naturally leading to its occurrence, the possibility that it might have happened without such negligence is not sufficient to break the chain of cause and effect.<sup>3</sup> An act of negligence will be regarded as the cause of an injury which results unless the consequences were so unnatural and unusual that they could not have been foreseen and prevented by the highest practicable care.<sup>4</sup>

It is competent for the legislature to change the rule of the common law, which looks only to the proximate cause of the mischief so far as legal responsibility is concerned, and allow a recovery to be had against those whose acts contributed, although remotely, to produce the wrong.<sup>5</sup> This is the effect of statutes in several states making the vendor of intoxicants, who sells them contrary to the terms of the law, liable to any per-

<sup>1</sup> *Williams v. Hays*, 143 N. Y. 442, 47 Am. St. 743, 38 N. E. Rep. 449, 26 L. R. A. 153; *Donaghy v. Brennan*, 19 N. Z. L. R. 289; *McIntyre v. Sholty*, 121 Ill. 660, 2 Am. St. 140, 13 N. E. Rep. 239; *Krom v. Schoonmaker*, 3 Barb. 647; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Ward v. Conatser*, 4 Baxter, 64; *Cross v. Kent*, 32 Md. 581; *In re Heller*, 3 Paige, 199. See § 394.

<sup>2</sup> *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 136; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. Rep. 1, 41 L. R. A. 794.

<sup>3</sup> *Reynolds v. Texas & P. R. Co.*, 37 La. Ann. 694; *Windeler v. Rush County Fair Ass'n*, 27 Ind. App. 92, 59 N. E. Rep. 209, 60 id. 954.

<sup>4</sup> *Louisville, etc. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. Rep. 968, 6 L. R. A. 193.

<sup>5</sup> *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Beers v. Walhizer*, 43 Hun, 254; *Homire v. Halfman*, 156 Ind. 470, 60 N. E. Rep. 154.

son who shall sustain any injury or damage to person, property or means of support by reason of such violation. Such a statute includes both direct and consequential injuries and creates a right of action unknown to the common law.<sup>1</sup> The rule is laid down in many cases that an action may be maintained under similar statutes for loss of means of support, when occasioned in whole or in part by such sales. If the means of support are lessened, and this result can be traced to the sale of "intoxicants, there is a right of recovery for such loss, as in case of lessened ability to labor, and loss of attention to business.<sup>2</sup> So, where sickness or insanity is the result of intoxication,<sup>3</sup> and where expenses are incurred for care and medical attention.<sup>4</sup> Where the husband was robbed while intoxicated the wife was allowed to sue.<sup>5</sup> And, so, where the husband spent his wife's money for drink.<sup>6</sup> And a mother was allowed to recover where her son overdrove her horse because he was intoxicated.<sup>7</sup> The mere spending by the husband of his own money, it has been said, will give a right of action by the wife.<sup>8</sup> And so a widow, dependent on her son, may maintain an action for the sale of liquors to him if injury results to her means of support,<sup>9</sup> and a father, if dependent.<sup>10</sup> Where a husband became so crazed by liquor that he committed murder and was sent to the penitentiary, his wife had a cause of action against the person who sold the liquor to him.<sup>11</sup> But if the statute does not give a wife an action for an injury to the person or property of her husband, she cannot recover because he has been imprisoned for a crime committed while under the influence of liquor unlawfully sold to him. His imprisonment is not the proxi-

<sup>1</sup> *Volans v. Owen*, 74 N. Y. 528, 30 Am. Rep. 337; *Meade v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Homire v. Halfman*, *supra*; *Neu v. McKech-nie*, 95 N. Y. 632, 47 Am. Rep. 89.

<sup>2</sup> *Wightman v. Devere*, 33 Wis. 570; *Hutchinson v. Hubbard*, 21 Neb. 33, 31 N. W. Rep. 245; *Volans v. Owen*, *supra*; *Schneider v. Hosier*, 21 Ohio St. 98.

<sup>3</sup> *Mulford v. Clewell*, 21 Ohio St. 191.

<sup>4</sup> *Wightman v. Devere*, *supra*.

<sup>5</sup> *Franklin v. Schermerhorn*, 8 Hun, 112.

<sup>6</sup> *McEvoy v. Humphrey*, 77 Ill. 388.

<sup>7</sup> *Bertholf v. O'Reilly*, 8 Hun, 16.

<sup>8</sup> *Quain v. Russell*, 8 Hun, 319; *Mulford v. Clewell*, *supra*; *Woolheather v. Risley*, 38 Iowa, 486; *Hackett v. Smelsley*, 77 Ill. 109.

<sup>9</sup> *McClay v. Worrall*, 18 Neb. 44, 24 N. W. Rep. 429.

<sup>10</sup> *Stevens v. Cheney*, 36 Hun, 1; *Volans v. Owen*, *Bertholf v. O'Reilly*, *supra*.

<sup>11</sup> *Homire v. Halfman*, *supra*; *Beers v. Walhizer*, 43 Hun, 254.

mate consequence of the dealer's unlawful act, out is the act of the law, the direct result of the intervention of an independent agency.<sup>1</sup> The Pennsylvania act provides that any person furnishing liquor to another in violation of law shall be civilly responsible for any injury to person or property in consequence thereof, and that any person aggrieved may recover full damages. This does not extend the common-law rule as to proximate cause, and there was no liability for the death of a man to whom liquors were sold while intoxicated where death<sup>a</sup> resulted in an attempt to evade arrest for violating the law after deceased left the place where the liquors were sold him.<sup>2</sup>

Under a statute providing that if a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless the person injured, etc., was guilty of gross or wilful negligence, the liability of the company does not depend upon whether its negligence was the proximate or efficient cause of the injury.<sup>3</sup>

**§ 17. Illustrations of the doctrine of the preceding section.** It is a misfeasance to go through a militia drill in the public squares and business resorts of towns or villages; the officer under whose command it is done is responsible for consequential damages; if a team hitched to a wagon and standing in the usual place takes fright at the exercises, the discharge of small arms, and the "pomp and circumstance" of mimic war, and runs away, and one of the horses is thereby killed, the officer is responsible for its value.<sup>4</sup> This case is a fair exemplification of the rule under consideration. Drilling the militia was lawful, but doing it in an improper manner or in an unsuitable place was a legal wrong to any person who in consequence thereof received injury. In ordering it to take place in a public square, the officer may not have considered

<sup>1</sup> *Bradford v. Boley*, 167 Pa. 506, 31 Atl. Rep. 751, disapproving *Beers v. Walhizer*, *supra*. 105, 25 S. E. Rep. 76, 58 Am. St. 870, 33 L. R. A. 191; *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415, 58 S. W. Rep. 737.

<sup>2</sup> *Roach v. Kelly*, 194 Pa. 24, 44 Atl. Rep. 1090, 75 Am. St. 685.

<sup>3</sup> *Wragge v. Railroad Co.*, 47 S. C.

<sup>4</sup> *Childress v. Yourie*, Meigs, 561; *Forney v. Geldmacher*, 75 Mo. 113.



the effect of frightening horses, but such an effect was natural; horses have to be trained to witness such a spectacle without being frightened; they were to be expected where the drill was appointed to take place, and if one or a team, with or without a driver or attendant, got frightened, it would naturally run away, and in running away the usual collisions and casualties might occur. The officer who gave the command was bound to consider all these probabilities. Giving the command, which no subordinate could decline to obey, made the drill at the place appointed the act of the officer, whether he was present or not; the frightening of the horses which ensued was probable from their known characteristics, and from their being where horses were likely to be; their break- [22] ing loose and running off in a state of fright, with or without a driver, made the usual collisions and casualties a natural sequence. Here were a series of acts so concatenated that the final damage from killing a horse was a result which the officer was bound to consider as likely to ensue; all the effects of the drill were an entirety, and therefore proceeded naturally and proximately from his act.

In a Massachusetts case this subject was well illustrated and explained. By careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of his driver, and to run violently along Fremont street, round a corner near by into Eliot street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. "Upon this statement," says Foster, J., delivering the opinion, "indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with his whip, and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very

likely to ensue from the careless act. We are not, therefore, dealing with remote or unexpected consequences, not easily foreseen, nor ordinarily unlikely to occur; and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom. . . . Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed by the maxim *sic utere tuo ut alienum [23] non lædas*. Where a right or duty is created wholly by contract it can only be enforced between the contracting parties. But where the defendant has violated a law it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law; and such a liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or unlimited sphere of accountability extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of. . . . It is clear from numerous authorities that the mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human beings does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence. So

long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable the legal liability continues. There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community or to all persons whom his negligence [24] may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant."<sup>1</sup>

§ 18. **Further illustrations.** Where a teamster's wagon, while being loaded at a depot, was injured by a train of cars, it was held he was entitled to recover for damage done thereto, for the loss of the trip in which he was engaged and for the loss of the use of the wagon until it could be repaired.<sup>2</sup> A similar measure is applied in cases of collision of boats; a reasonable sum for the damage the injured boat has received; the expense of raising it, if sunk, and of repairing it, and compensation for the loss of the use during the time it is being refitted, with interest on such items.<sup>3</sup> In an action of trespass by forcibly invading a plantation, carrying off some slaves and frightening others away, it was held proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and crops—to the former for want of the assistance of the slaves to preserve it from a subsequent flood, and to the latter to protect them against animals.<sup>4</sup> The wrong included leaving a plantation with growing crops and other property

<sup>1</sup> McDonald v. Snelling, 14 Allen, 292; Weick v. Lander, 75 Ill. 93; Clowdis v. Fresno Flume & Irrigation Co., 118 Cal. 315, 62 Am. St. 238, 50 Pac. Rep. 373; Clark v. Chambers, 3 Q. B. Div. 327, 7 Cent. L. J. 11.

In the last case defendant was held liable for an injury caused by a dangerous thing put by him in a carriage way, although it was afterwards removed to a footpath by a third person, and was there when the plaintiff was injured.

<sup>2</sup> Shelbyville, etc. R. Co. v. Lewark, 4 Ind. 471.

<sup>3</sup> Mailler v. Express Propeller Line, 61 N. Y. 312; Brown v. Beatty, 35 Up. Can. Q. B. 328; Steamboat Co. v. Whilldin, 4 Harr. 228; New Haven, etc. Co. v. Vanderbilt, 16 Conn. 420; Williamson v. Barrett, 13 How. 101. See ch. 39.

<sup>4</sup> McAfee v. Crofford, 13 How. 447; Hobbs v. Davis, 30 Ga. 423; Johnson v. Courts, 3 Har. & McHen. 510; Crane v. Patton, 57 Ark. 340, 346, 21 S. W. Rep. 466.

exposed to injury from any cause which might arise; there being no force of laborers to meet any exigency, the wrongdoer was bound to take notice at his peril of any exposure to injury thus created by flood, marauding cattle or otherwise; whether an action would lie against the owner of trespassing cattle or not for the damage done by them was held immaterial.<sup>1</sup> The owner of sheep which had a contagious disease suffered them to trespass on another's land and to mingle with his sheep, to which the disease was communicated, causing the death of many of the latter. He was held liable for the breach of the close, also for the loss of the sheep that so died.<sup>2</sup> A [25] railroad company's servant left bars down between the plaintiff's field and the railroad track; horses escaped through the opening to the railroad and were killed by the engine; the company was held liable.<sup>3</sup> Plaintiff's horses escaped into the defendant's close by reason of the latter not keeping his fence in repair, and were there killed by the falling of a hay stack; he was held responsible.<sup>4</sup> The defendant's cow escaped from his enclosure without fault on his part, passed to the plaintiff's premises and entered his barn; her weight broke the sleepers and floor at a point over a cistern and she fell into it. Soon after this the plaintiff went to his barn and fell into the cistern through the hole made by the cow. It was conceded that the defendant was liable for the trespass by the cow,<sup>5</sup> but the damages resulting to the plaintiff from his fall were too remote.<sup>6</sup> The proximate cause of a personal injury produced by the running away of a horse which left a race track through an open-

<sup>1</sup> Where a dog went onto plaintiff's land and barked at his horse grazing in an enclosed field, and the horse ran, tried to leap a fence, and fell and broke its neck, the owner of the dog was liable. *Doyle v. Vance*, 6 Vict. (L. R. (law)) 87.

<sup>2</sup> *Barnum v. Vandusen*, 16 Conn. 200; *Fultz v. Wycoff*, 25 Ind. 321. See *Gilman v. Noyes*, 57 N. H. 627. See, as to liability under the act of congress of 1884, 23 Stats. 31, *Croff v. Cresce*, 7 Okl. 408, 54 Pac. Rep. 558; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac.

Rep. 982, affirmed, *sub nom. Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. Rep. 1064.

<sup>3</sup> *White v. McNett*, 33 N. Y. 371; *Henly v. Neal*, 2 Humph. 551.

<sup>4</sup> *Powell v. Salisbury*, 2 Y. & J. 391; *Gilbertson v. Richardson*, 5 C. B. 502; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Couch v. Steel*, 3 El. & B. 402; *Lee v. Riley*, 18 C. B. (N. S.) 722.

<sup>5</sup> *Dickson v. McCoy*, 39 N. Y. 400.

<sup>6</sup> *Hollenbeck v. Johnson*, 79 Hun, 499, 29 N. Y. Supp. 945.

ing in the fence surrounding the same, is not the running away of the horse but the opening.<sup>1</sup>

The lessee of a wharf was guilty of negligence in not keeping it in repair; he suffered the railing to become dilapidated, and in consequence a horse backed into the river with a wagon, and both were lost. This loss was held to be the natural and proximate effect of the negligence.<sup>2</sup> A gas company, having contracted to supply plaintiff with a service pipe from its main to the meter on his premises, laid a defective pipe from which the gas escaped. A workman, in the employ of a gas-fitter engaged by the plaintiff to lay pipes leading from the meter over his premises, negligently took a lighted candle for the purpose of finding out where the gas escaped. An explosion took place damaging the plaintiff's premises; he brought an action against the gas company and it was held that the damages were not too remote.<sup>3</sup> The failure of a natural-gas company to supply gas to a consumer in accordance with its contract is a tort, the agreement being a mere statement of the reasonable conditions under which the company's duty was to be performed. If there is a failure to supply gas during cold winter weather and the company has been notified of its customer's inability to procure fuel elsewhere, and of the sickness of his children, and as a result of such failure the sick children take a relapse and die, the company is responsible for their death.<sup>4</sup> In consequence of the negligence of a contractor for a public body in constructing a sewer a gas main was broken, and the gas escaped from it by percolation into the plaintiffs' house, and an explosion followed which injured one of them

<sup>1</sup> *Windeler v. Rush County Fair Ass'n*, 27 Ind. App. 92, 97, 59 N. E. Rep. 209, 60 id. 954.

<sup>2</sup> *Radway v. Briggs*, 37 N. Y. 256, 35 How. Pr. 422.

<sup>3</sup> *Burrows v. March Gas Co.*, 39 L. J. (Ex.) 33, L. R. 5 Ex. 67; *Lannen v. Albany Gas L. Co.*, 44 N. Y. 459; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. Rep. 522, 34 Am. St. 653, 18 L. R. A. 759.

The injury resulting to the business reputation of a florist from the

sale of plants injured by escaping gas and which were sold as sound, but were not, is too remote. *Dow v. Winnepesaukee Gas & Electric Co.*, 69 N. H. 312, 41 Atl. Rep. 288, 42 L. R. A. 569.

<sup>4</sup> *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. Rep. 17, 36 L. R. A. 535; *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21. In the latter case the defendant had no knowledge of the illness of the person who died.

and damaged the furniture of the other. The damages were not too remote, and the contractor's negligence was that of the public body because he failed to do what it was its duty to do.<sup>1</sup> A railroad company by wrongfully excavating in a public street destroyed the lateral support of the soil to the foundation of a house, and thereby plaintiff's adjoining house, depending on the other for support, was injured; it was held that the company was liable for the injury.<sup>2</sup> By the weight of authority a person who negligently sets a fire is not only liable for the first building consumed, but for all subsequently destroyed by the same continuous conflagration, without regard to the distance the fire runs or the time it is in progress.<sup>3</sup>

In New York the liability is much more restricted on the ground that the loss of the first building which is negligently set on fire was to be anticipated; its destruction was the ordinary and natural result of its being fired. But this does not hold good as to subsequent buildings or other property which became ignited from the first building; that the fire should spread and other buildings be consumed is not a necessary or the usual result. That result depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are said to be accidental and varying circumstances over which the party responsible for the loss of the first building has no

<sup>1</sup> *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335.

<sup>2</sup> *Baltimore, etc. R. Co. v. Reaney*, 42 Md. 118.

<sup>3</sup> *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. Rep. 764; *Adams v. Young*, 44 Ohio St. 80, 4 N. E. Rep. 599; *Small v. C. & P. R. Co.*, 55 Iowa, 582, 7 N. W. Rep. 398; *Kellogg v. Chicago, etc. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Hart v. Western R. Co.*, 13 Met. 99; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494, 9 Am.

Rep. 63; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *St. Joseph, etc. R. Co. v. Chase*, 11 Kan. 47; *Atchison, etc. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Atchison, etc. R. Co. v. Bales*, 16 Kan. 252; *Dougherty v. Smith*, 5 N. Z. (Supreme Ct.) 374; *Chicago & E. R. Co. v. Ludington*, 10 Ind. App. 636, 38 N. E. Rep. 342; *Chicago, etc. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. Rep. 596; *Louisville, etc. R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. Rep. 51, 9 L. R. A. 750; *Wyant v. Crouse*, 127 Mich. 158, 86 N. W. Rep. 527, 53 L. R. A. 626.

control, and is not liable for their effects.<sup>1</sup> The same rule has been applied where two buildings owned by one person were burned — the recovery was limited to the one to which the fire was directly carried from the engine.<sup>2</sup> The same rule applies to fires on woodlands as to fires in villages or cities.<sup>3</sup> This restriction seems very arbitrary, and to be out of harmony with the general principle of the law governing proximate cause. It has not become the rule in New York without vigorous dissent from individual members of the court of appeals, extending to the latest case cited. The burning of property is not the natural and proximate result of an engineer running a train of oil-tanks into a mass of earth which had come on the track as a result of a landslide, the obstruction being unexpected and an engine having passed over a clear track only ten minutes before the accident. He was not bound to anticipate the bursting of the tanks, the taking fire of the oil, the burning oil being carried down the stream into which the tanks rolled, the sudden rise of the water, and the setting fire of property on the bank of the stream.<sup>4</sup>

The fall of a negligently constructed tower, the overturning of a lighted lamp and the consequent death of a person are the proximate result of the negligent construction.<sup>5</sup> The maintenance of a culvert in a condition to hold a large pool of water in close proximity to the street and sidewalk is the cause of the death of a child who falls therein while playing along the edge thereof.<sup>6</sup> The negligent operation of a defective locomotive which emits sparks is the proximate cause of the death of an infant asleep in the house of its parents when the fire occurs from such sparks.<sup>7</sup> If a train is stopped on a mountain side, and the engineer leaves his engine, and during

<sup>1</sup> *Ryan v. New York Central R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49; *Webb v. Rome & O. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389. See *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. Rep. 608.

<sup>2</sup> *Frace v. New York, etc. R. Co.*, 143 N. Y. 182, 38 N. E. Rep. 102; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. Rep. 468, 7 L. R. A. 130.

<sup>3</sup> *Hoffman v. King*, 160 N. Y. 618,

55 N. E. Rep. 401, 73 Am. St. 715, 46 L. R. A. 672.

<sup>4</sup> *Hoag v. Lake Shore, etc. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653.

<sup>5</sup> *Rigdon v. Temple Water-works Co.*, 11 Tex. Civ. App. 542, 32 S. W. Rep. 828.

<sup>6</sup> *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. Rep. 47.

<sup>7</sup> *Gulf, etc. R. Co. v. Johnson*, 51 S. W. Rep. 531 (Tex. Civ. App.).

his absence the fireman, accidentally or otherwise, sets the engine in motion and the train moves downward, the violation of the rules of the company by the engineer will authorize a finding that his act was the proximate cause of the injury to the conductor, who was thrown off the train.<sup>1</sup>

[26] § 19. **Further illustrations.** The owner of a horse and cart who leaves them unattended in a public street is liable for any damage to children resorting there and meddling with either.<sup>2</sup> The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned thereby.<sup>3</sup> It is negligence for a dealer to sell, contrary to law, dangerous explosives to children. When this is done with knowledge that the purchasers are not familiar with their use the vendor is held to know that the probable consequences will be injury to them or to their associates; and he is liable to the party injured although the injuries were the result of the natural conduct of a child who did not purchase the article which produced them.<sup>4</sup> But the mere fact that the law forbids the sale of fire-arms to a minor does not make the vendor liable for the consequences unless he knew that the purchaser was ignorant of their character, inexperienced in the use of them, or that there was something in his character or disposition which rendered it unsafe for him to have them.<sup>5</sup> Leaving an iron truck with a hot iron casting upon it in a street where children are accustomed to go and in a condition to do injury by slight interference is negligence, which will be regarded as the proximate cause of any injury to a child which may result therefrom.<sup>6</sup> The rule is the same when lumber is so carelessly piled on an unfenced lot abutting

<sup>1</sup> Mexican National R. Co. v. Mussette, 86 Tex. 708, 24 L. R. A. 642, 26 S. W. Rep. 1075, 7 Tex. Civ. App. 169, 24 S. W. Rep. 520.

<sup>2</sup> Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 C. & P. 190; Dickson v. McCoy, 39 N. Y. 400; Mills v. Bunke, 59 App. Div. 39, 69 N. Y. Supp. 96; Mahoney v. Dwyer, 84 Hun, 34, 32 N. Y. Supp. 346.

<sup>3</sup> Dixon v. Bell, 5 M. & S. 198; Meers v. McDowell, 23 Ky. L. Rep. 461, 62 S. W. Rep. 1013, 53 L. R. A. 789.

<sup>4</sup> Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508.

<sup>5</sup> Poland v. Earhart, 70 Iowa, 285, 30 N. W. Rep. 637; Meyer v. King, 72 Miss. 1, 7, 16 So. Rep. 245, 35 L. R. A. 474, citing the text, and disapproving a criticism of the Iowa case in 36 Am. St. 807, 817. See Harris v. Cameron, 81 Wis. 239, 29 Am. St. 891, 51 N. W. Rep. 437.

<sup>6</sup> Lane v. Atlantic Works, 107 Mass. 104; Osake v. Larkin, 40 Kan. 206, 2 L. R. A. 56, 19 Pac. Rep. 658; Mc-



upon a street as to fall upon children playing near it.<sup>1</sup> The defendant's servant left a truck standing near a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street; after which a third person tried to drive his truck between those two. In attempting to do so with due care he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street. This was treated as the sole cause of the plaintiff's injury, and was deemed sufficiently proximate to render the defendant responsible.<sup>2</sup> He was liable for the act of his servant, for the latter was engaged in his master's work; it was negligence to leave the truck in the street when not in use; it was considered that the driver of the truck, who was the immediate agent of the force which injured the plaintiff, had a right to attempt to pass between the two trucks, if he conducted himself with due care, and exercised a sound discretion in determining whether the attempt could be [27] made with safety to persons lawfully using the street. And as the jury found that in the exercise of such care, prudence and discretion he made the attempt which resulted in the injury sustained by the plaintiff, the defendant was liable inasmuch as his truck was unlawfully in the street, and that should be regarded as the natural and proximate cause of the injury. The decision imports that a danger not apparent enough to deter the driver from attempting to pass the truck of the defendant could legally be apparent enough to render the injury proximate to the illegal use of the street by leaving the truck there.

The jury may find that the injury was probable, although brought about by a new agency, when heavy articles left near

Dowall v. Great Western R. Co.,  
[1902] 1 K. B. 618; Travell v. Banner-  
man, 71 App. Div. 439, 75 N. Y. Supp.  
866.

<sup>1</sup>Bransom's Adm'r v. Labrot, 81  
Ky. 638.

<sup>2</sup>Powell v. Deveney, 3 Cush. 300,  
50 Am. Dec. 738.

an opening in the floor of an unfinished building or in the deck of a vessel were accidentally jostled so that they fell upon persons below.<sup>1</sup>

A man who negligently sets and keeps a fire on his own land is liable for any injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated.<sup>2</sup> The defendants moored their boats in the channel and entrance to the locks at a dam across a river so that the boats of others were stopped outside and exposed to the current, then rapidly rising, until by its force such boats were carried over the dam and lost without any fault of the owners. It was held that the defendants negligently or wantonly caused this injury and were liable for it.<sup>3</sup> The plaintiff's boat had anchored at a wharf when the water was low. The river rose afterwards, covering certain piles of pig iron negligently left by the defendant on the wharf about a foot above low-water mark. To avoid these piles the boat was compelled to back out into the stream, where she was struck by some floating body, stove and sunk. The defendant was held liable for the loss of the boat.<sup>4</sup> The defendant broke and entered the plaintiff's close adjacent to a river and carried away gravel from a bank, near to a dam across the river, in consequence of which a flood in the river three weeks afterward swept away a portion of the close and a cider mill. It was held that the [28] whole damage might be recovered.<sup>5</sup> A harbor company which had been in the habit of keeping a light on the end of one of its piers to enable vessels to safely enter the harbor at night discontinued the light without public notice. A vessel was afterwards lost in attempting to enter in the absence of the light. It was held that the harbor company was liable for

<sup>1</sup> *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. Rep. 464; *The Joseph B. Thomas*, 81 Fed. Rep. 578, 30 C. C. A. 33, 46 L. R. A. 58.

<sup>2</sup> *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Martin v. New York, etc. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239; *East Tennessee, etc. R. Co. v.*

*Hesters*, 90 Ga. 11, 15 S. E. Rep. 828. See § 18.

<sup>3</sup> *Scott v. Hunter*, 46 Pa. 192.

<sup>4</sup> *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65.

<sup>5</sup> *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. D. c. 281

the value of the vessel lost and also for certain moneys expended in good faith, with a reasonable expectation of success, in attempting to raise her.<sup>1</sup> One who maliciously causes the arrest of an engineer while he is engaged in running a train is liable to his employer for the damage resulting from the delay.<sup>2</sup>

It cannot be affirmed that it is not the natural and reasonable consequence of the sale of liquors to an intoxicated person between whose home and the place where the sale is made there are railroad tracks that such person should in a dark night meet with injury or death from a train of cars.<sup>3</sup> If weeds or brush are allowed to grow upon the right of way of a railroad company to such a height as to obstruct the view of a highway crossing and animals are injured by a train the company will be liable;<sup>4</sup> and so if cattle concealed in such weeds or brush cause the wrecking of a train and the injury of a person thereon.<sup>5</sup> If the unlawful speed of a train upon station grounds stampedes animals at large there and they run upon the track, either by breaking down fences or otherwise, and are killed by the negligent running of the train, such speed is the direct cause of the killing.<sup>6</sup> It is not the natural consequence of the intoxication of a man to whom liquors are sold in violation of law that his wife, while following him in the street for the purpose of ascertaining where he procures liquor, shall fall and injure herself, and the seller is not liable for such injury.<sup>7</sup> The neglect to fence a railroad and track is not the proximate cause of an injury to an animal sustained by putting its foot into a small hole while running along the track; such an occurrence is so unusual as not to be expected by a reasonable man.<sup>8</sup> There is no connection between the failure of a railroad company to provide separate accommodations for white and colored passengers, where that is required, and an assault made upon one of the latter, by a fellow pas-

<sup>1</sup> *Sweeney v. Port Burwell Harbor Co.*, 17 Up. Can. C. P. 574.

<sup>2</sup> *St. Johnsbury, etc. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

<sup>3</sup> *Schroeder v. Crawford*, 94 Ill. 357.

<sup>4</sup> *Indianapolis, etc. R. Co. v. Smith*, 78 Ill. 112.

<sup>5</sup> *Eames v. T. & N. O. R. Co.*, 63 Tex. 660.

<sup>6</sup> *Story v. Chicago, etc. R. Co.*, 79 Iowa, 402, 44 N. W. Rep. 690.

<sup>7</sup> *Johnson v. Drummond*, 16 Ill. App. 641.

<sup>8</sup> *Nelson v. Chicago, etc. R. Co.*, 30 Minn. 74, 14 N. W. Rep. 360.

senger, without the knowledge or consent of the company's servants, after the removal of the passenger assaulted from the ladies' car to a smoking car;<sup>1</sup> nor between the act of a mortgagee who takes possession of property under his mortgage before default and injury to crops because a mule needed to work them was taken;<sup>2</sup> nor between threats made to arrest a debtor and a miscarriage by his wife, no physical violence being used;<sup>3</sup> nor between a like result and the false imprisonment of a husband;<sup>4</sup> nor as a result of the wrongful finding of an indictment against him.<sup>5</sup> One who invites a person to drink liquor with him is not responsible for an assault made by the person who accepts such invitation upon a third individual, although the liquor so drank made him intoxicated.<sup>6</sup>

**§ 20. Consequential damages under fence statutes.** When a new right is conferred by statute and a corresponding duty is thereby enjoined, the liability of the defaulting party to the other is confined to the limits prescribed by the statute. Hence, when a statute concerning division fences provides that the party who shall neglect to maintain such fences shall be liable to the party injured by his default for "such damages as shall accrue to his lands, crops, fruit-trees, shrubbery and fixtures," there is no liability for injuries which may be sustained by animals while trespassing on the lands of the party who has failed to maintain his fence.<sup>7</sup> It has been attempted, in order to restrict the liability of railroad companies for neglect to fence their tracks, to apply this principle. The duty is for the protection of the public as well as for the benefit of persons who stand in other relations to the party upon whom it is enjoined, and the neglect of the duty entitles the party who is thereby injured to all the relief due him in either or both relations.<sup>8</sup> But this view is not accepted in some jurisdictions, or at least the strict construction given such statutes is not in harmony with it, though the question in the aspect stated is

<sup>1</sup> Royston v. Illinois Central R. Co., 67 Miss. 376, 7 So. Rep. 320.

<sup>2</sup> Jackson v. Hall, 84 N. C. 489.

<sup>3</sup> Wulstein v. Mohlman, 57 N. Y. Super. Ct. 50, 5 N. Y. Supp. 569.

<sup>4</sup> Ellis v. Cleveland, 55 Vt. 358; Huxley v. Berg, 1 Starkie, 98.

<sup>5</sup> Hampton v. Jones, 58 Iowa, 317, 12 N. W. Rep. 276.

<sup>6</sup> Swinfin v. Lowry, 37 Minn. 345, 34 N. W. Rep. 22.

<sup>7</sup> Crandall v. Eldridge, 46 Hun, 411.

<sup>8</sup> Graham v. President, etc., 46 Hun, 386; Crandall v. Eldridge, id. 411.

not considered. Under a statute requiring railroad companies to fence and declaring them liable for all damages resulting from their neglect to do so which may be done by their "agents, engines or cars," liability does not extend to consequential injuries to an animal which gets upon the track by reason of the failure to fence, as where it is injured, after being frightened by an approaching train, either by jumping a cattle-guard or by coming in contact with a wire fence, or both, no wilful misconduct being charged against the train-men.<sup>1</sup> The injuries contemplated by such language are only those which result from a direct or actual collision of the engines or cars with the animal injured.<sup>2</sup> The same conclusion has been reached from language which imposed liability if animals "shall be killed or injured by the cars, or locomotive, or other carriages."<sup>3</sup> Where it is provided that railroad companies shall be liable for animals killed or injured by their negligence, and that a "failure to build and maintain fences shall be deemed an act of negligence," such a construction as was given in the above cases is unwarranted.<sup>4</sup> Under a statute which provides that on neglect to fence the road the company shall be liable for all damages sustained by any person in consequence, damages may be recovered for injury done to a farm by rendering it less fit for pasturage because of such neglect.<sup>5</sup> The same liability has been declared to exist under a statute which employs the words "shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals;"<sup>6</sup>

<sup>1</sup> *Schertz v. Indianapolis, etc. R. Co.*, 107 Ill. 577; *Knight v. New York, etc. R. Co.*, 99 N. Y. 25, 1 N. E. Rep. 108, reversing 30 Hun, 415, distinguished in *Leggett v. Rome, etc. R. Co.*, 41 Hun, 80.

<sup>2</sup> *Ibid.*; *Lafferty v. Hannibal, etc. R. Co.*, 44 Mo. 291; *Foster v. St. Louis, etc. R. Co.*, 90 Mo. 116, 2 S. W. Rep. 138, and other Missouri cases cited therein.

<sup>3</sup> *Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Jeffersonville, etc. R. Co. v. Downey*, 61 Ind. 287.

In the last case one of two animals, which were tied together, was

struck by the train; both were killed. A recovery was allowed for but one.

The construction given the Missouri statute is forcibly criticised in 25 Am. L. Rev. 114, 264.

<sup>4</sup> *Nelson v. Chicago, etc. R. Co.*, 30 Minn. 74, 14 N. W. Rep. 360.

<sup>5</sup> *Emmons v. Minneapolis, etc. R. Co.*, 35 Minn. 503, 29 N. W. Rep. 202; *Nelson v. Same*, 41 Minn. 131, 42 N. W. Rep. 788.

<sup>6</sup> *Leggett v. Rome, etc. R. Co.*, 41 Hun, 80. It is doubtful whether this case is in harmony with *Knight v. New York, etc. R. Co.*, 99 N. Y. 25, 1 N. E. Rep. 108.

and under that statute a railroad company has been held liable where a horse fell into a cut made by the company along a pasture, which cut was not fenced.<sup>1</sup>

**§ 21. Nervous shock without impact; the Coultas case and American cases in harmony with it.** In 1888 the question whether damages for a nervous shock or injury caused by the defendant's negligence in permitting the plaintiff to cross its track when it was dangerous to do so, and its servant had knowledge of the danger, came before the English privy council on appeal from the supreme court of Victoria. The latter court was of the opinion that the damages were not too remote.<sup>2</sup> Its judgment was reversed, and the rule declared to be that damages arising from mere sudden terror, unaccompanied by actual physical injury, cannot be considered a consequence which, in the ordinary course of things, would flow from such negligence.<sup>3</sup> The court observed that it was remarkable that

<sup>1</sup> *Graham v. President, etc.*, 46 Hun, 386.

<sup>2</sup> *Coultas v. Victorian Ry. Commissioners*, 12 Vict. L. R. 895.

<sup>3</sup> *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222. The facts are stated in the next section.

The doctrine of the Coultas case, though repeatedly dissented from in England (see § 23a) and denied in Ireland, has been declared by several American courts. *Braun v. Craven*, 175 Ill. 401, 51 N. E. Rep. 657, 42 L. R. A. 199, affirming *Craven v. Braun*, 73 Ill. App. 401; *Mitchell v. Rochester R. Co.*, 151 N. Y. 101, 45 N. E. Rep. 354, 34 L. R. A. 781, 56 Am. St. 604, reversing 77 Hun, 607; *Gulf, etc. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. Rep. 419, 40 Am. St. 866; *San Antonio, etc. R. Co. v. Corley*, 87 Tex. 432, 29 S. W. Rep. 231 (see § 24 for Texas cases allowing recovery, under some circumstances, for nervous injury); *Gatzow v. Buening*, 106 Wis. 1, 20, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. 17; *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. Rep. 738, 49 L. R. A. 77; *Spade v. Lynn &*

*B. R. Co.*, 172 Mass. 488, 52 N. E. Rep. 747, 70 Am. St. 298, 168 Mass. 285, 47 N. E. Rep. 88, 60 Am. St. 393, 38 L. R. A. 512; *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. 40, 23 Atl. Rep. 340, 14 L. R. A. 666, 30 Am. St. 709; *Wyman v. Leavitt*, 71 Me. 227; *Haile v. Texas & P. R. Co.*, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202, 47 N. E. Rep. 694; *Gaskins v. Runkle*, 25 Ind. App. 548, 58 N. E. Rep. 740; *Lee v. Burlington*, 113 Iowa, 356, 85 N. W. Rep. 618, 86 Am. St. 379; *Nelson v. Crawford*, 123 Mich. 466, 80 Am. St. 577, 81 N. W. Rep. 335; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. Rep. 453; *St. Louis, etc. R. Co. v. Bragg*, 69 Ark. 402, 64 S. W. Rep. 226, 86 Am. St. 206. And is recognized as binding in Ontario (*Henderson v. Canada Atlantic R. Co.*, 25 Ont. App. 437), as it doubtless is in all the other British colonies. It has been said of it in New South Wales that it is binding there, "and when we are called upon to decide a

no precedent was cited of a similar action having been maintained or even instituted.<sup>1</sup> It has since come to the knowledge of the legal world that such an action had been maintained before that time. In 1890 substantially the same

case in which the facts are identical, we shall be compelled to follow it. But I," said the chief justice, "do not feel inclined to extend the principle of the decision in any way." *Rea v. Balmain New Ferry Co.*, 17 N. S. W. (law) 92. See *Pelmothe v. Phillips*, 20 id. 61, and 1 Beven on Neg. (2d ed.), p. 76 *et seq.*

The American cases which deny redress for nervous shock and its results do not all rest upon the same ground, though most of them take the view that the damages are too remote. It is said in Massachusetts: "The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." The rule is thus limited there: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been on the actor's mind." *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. Rep. 88, 60 Am. St. 393, 38 L. R. A. 512. See *Homans v. Boston E. R. Co.*, 180 Mass. 456, 57 L. R. A. 291, 62 N. E. Rep. 737, stated in last paragraph of § 22.

In a Wisconsin case the rule was applied under conditions which make it particularly noticeable, and lead to some doubt as to whether the decision is right if damages for nervous shock are recoverable at all. A combination of liverymen was formed to limit their services to persons patronizing them exclusively and to monopolize the livery business in Milwaukee, including service for funerals. Such combination, the court held, was unlawful, and any member of it who acted in accordance with the regulations was liable for compensatory damages to a person specially injured by an overt act. A member of such association let a hearse and carriage to the plaintiff for the funeral of his child, but, upon learning that the person in charge was an undertaker and liveryman doing an independent business, joined with the association in sending the vehicles away from the plaintiff's house just as they were about to be used. Here, then, is an unlawful combination, doing or causing the doing of an act wilfully, with knowledge that the natural result will be to cause plaintiff mental distress or nervous shock. It is said in the opinion: "There was no physical injury to plaintiff, and no personal injury to him of any kind save to his feelings. The case does not fall within the few exceptions to the rule,—which prevails in this state and in most jurisdictions,—that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under

<sup>1</sup> But see § 23.

question came, for the second time, before the courts of Ireland, and they reached a conclusion squarely opposite to that arrived at by the privy council, and one which is supported by better reasoning and is more in harmony with justice. The

the general principle applicable to tort actions that recoverable damages are limited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite causal connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured in a money standard by average human wisdom with a reasonable degree of certainty." *Gatzow v. Buening*, 106 Wis. 1, 20, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. 17.

In the New York case plaintiff was standing upon a crosswalk awaiting an opportunity to board one of the defendant's cars which had stopped there. While there, and as she was about to step upon the car, a horse of the defendant came down the street, and as the team attached to it drew near it turned and came so close to the plaintiff that she stood between the horses' heads when they were stopped. The fright and excitement rendered her unconscious, and there was a miscarriage and consequent illness. Because there could be no recovery for the fright, there could be none for the illness consequent upon it. The miscarriage was not the proximate result of the defendant's negligence, but the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated. Another reason for denying the right of action was that a flood of litigation might be anticipated, with a wide field opened for fictitious

or speculative claims. *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 56 Am. St. 604, 45 N. E. Rep. 354, 34 L. R. A. 781.

See 15 Harvard L. Rev. 304, for an answer to some of the foregoing objections to recovery in such cases.

The Minnesota cases on this question are reviewed in *Sanderson v. Northern Pacific R. Co.*, 92 N. W. Rep. 542. In that case the plaintiff sought to recover for personal injuries, due solely to fright and grief, because an attempt was made to put her children off the car, she not having been interfered with, nor having been put in fear of any physical injury or personal violence. The rule was declared to be that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. See *Bucknam v. Great Northern R. Co.*, 76 Minn. 373, 79 N. W. Rep. 98.

*Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. 203, is an illustration of what constitutes a legal wrong so as to afford a basis for the recovery of damages resulting from mental disturbance. The plaintiff, who was pregnant, was a passenger on one of the defendant's cars. By its negligence in their management a collision seemed inevitable, and the plaintiff was put in a position of such peril as to cause fright, which produced a miscarriage. Though there was no collision and no impact, the negligence was the cause of the plaintiff's injury, and entitled her to recover.



action was brought by a husband and his wife, and arose out of the following facts: The female plaintiff was a passenger in an excursion train on the defendant's railway. The train was too heavy to be drawn up an incline, and was divided, the car in which the plaintiff was remaining attached to the engine. The rear part of the train descended the incline with great velocity; the engine was thereafter reversed and with the car the plaintiff occupied followed at a high rate of speed, until stopped with a violent jerk. The proof showed that A. was put in great fright by the occurrence, and suffered from nervous shock in consequence; that she was incapacitated from performing her ordinary avocations; medical witnesses expressed the opinion that paralysis might result. The jury were charged that if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed the plaintiff, and she was actually put in great fright by the circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such fright, and was actually occasioned thereby, damages for such injury would not be too remote. The material facts were found in the plaintiff's favor. In considering the objections to the refusal of the court to charge, as requested by the defendant, that if damages or injury were the result of, or arose from, mere fright, not accompanied by actual physical injury, even though there might be a nervous or mental shock occasioned by the fright, such damages would be too remote, Palles, C. B., said: "This objection presupposes that the plaintiff sustained, by reason of the defendant's negligence, 'injury' of the class left to the consideration of the jury by the summing-up, i. e., injury to health, which is bodily or physical injury; and the proposition presented is that damages for such injury are not recoverable if two circumstances occur: (1) if the only connection between the negligence and this bodily injury is that the former caused fright, which caused nervous or mental shock, which shock caused the bodily injury complained of; and (2) that this so-called bodily injury did not accompany the fright, which I suppose means that the injury, although in part occasioned by the fright, assumed the character of bodily injury subsequently to, and not at, the time of the negligence or fright. To sustain this contention,

it must be true whether the shock which it assumed to have been caused was either mental or nervous; and as the introduction of the word 'mental' may cause obscurity, by involving matter of a wholly different nature, unnecessary to be taken into consideration here, I eliminate it from the question. If there be a distinction between mental shock and nervous shock, then the objection cannot be sustained. It is then to be observed: (1) that the negligence is a cause of the injury, at least in the sense of a *causa sine qua non*; (2) that no intervening independent cause of the injury is suggested; (3) that jurors, having regard to their experience of life, may hold fright to be a natural and reasonable consequence of such negligence as occurred in the present case. If, then, such bodily injury as we have here may be a natural consequence of fright, the chain of reasoning is complete. But the medical evidence here is such that the jury might from it reasonably arrive at the conclusion that the injury, similar to that which actually resulted to the plaintiff from the fright, might reasonably have resulted to any person who had been placed in a similar position. It has not been suggested that there was anything special in the nervous organization of the plaintiff which might render the effect of the negligence or fright upon her different in character from that which it would have produced in any other individual. I do not myself think that proof that the plaintiff was of an unusually nervous disposition would have been material to the question; for persons, whether nervous or strong-minded, are entitled to be carried by railway companies without unreasonable risk of danger; and my only reason for referring to the circumstance is to show that, in this particular case, the jury might have arrived at the conclusion that the injury which did in fact ensue was a natural and reasonable consequence of the negligence which actually caused it.

"Again, it is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause

and effect exists between such negligence and the injury, yet such relation *cannot* in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time — say a week, a fortnight, or a month — must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration. This train of reasoning might be pursued much farther; but in consequence of the decision to which I shall hereafter refer, I deem it unnecessary to do so.”

§ 22. **Same subject; criticism of the Coultas case; nervous shock a physical injury.** The chief baron then proceeded to review the English case cited in the opening paragraph of the previous section: “In support of their contention the defendants relied upon the *Victorian Railway Commissioners v. Coultas*. That was a remarkable case. The statement of claim alleged that through the negligence of the servants of the defendants, in charge of a railway gate at a level crossing, the plaintiffs, while driving over it, were placed in imminent peril of being killed by a train, and by reason thereof the plaintiff, Mary, received a shock and suffered personal injuries. It appeared that the female plaintiff, whilst returning with her husband and brother in the evening, from Melbourne to Hawthorn, in a buggy, had to cross the defendant’s line of railway at a level crossing. When they came to it the gates were closed; the gate-keeper opened the gates nearest to the plaintiffs, and then went across the line to those on the opposite side. The plaintiffs followed him, and were partly onto the up-line (the further one), when the train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He succeeded in getting the buggy across the line, so that the train, which was going at a rapid speed, did not touch it, although it passed close at the back of it. As the train approached the plaintiff, Mary, fainted. The medical evidence showed that she received a severe *nervous* shock from the fright, and that the illness from which she afterward suffered (and which is stated in Mr. Beven’s book

on Negligence to have included a miscarriage) was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system — *nervous shock*; and that the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to *nervous shock*. It is to be observed from this evidence the jury might have inferred that physical injury was sustained by the female plaintiff at the time of the occurrence in question. Although one witness spoke of nervous shock as contradistinguished from physical damage, the question would still have been open for the jury whether the nervous shock was not — as in the generality of, if not indeed all, cases it necessarily must be — physical injury. The jury found for the plaintiffs. Upon an appeal the privy council, without deciding that an impact was necessary to sustain the action, not only set aside the verdict, but entered judgment for the defendants. In delivering judgment Sir R. Couch says: 'Her fright was caused from seeing the train approaching, and thinking she was going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, *under such circumstances* (their lordships think), be considered *a consequence* which, in the ordinary course of things, would flow from the negligence of the gate-keeper.'

"Amongst the reasons stated in the judgment in support of this conclusion are: 1, that a contrary doctrine would involve damages on account of *mental* injury being given in every case where the accident caused by the negligence had given the person a severe nervous shock; 2, that no decision of an English court had been produced in which, upon such facts, damages were recovered; 3, that a decision of the supreme court of New York (*Vandenburgh v. Truax*)<sup>1</sup> which was relied upon, was distinguishable as being a case of *palpable* injury. Of these reasons, the first seems to involve that injuries other than mental cannot result from nervous shock; and the third implies that injuries resulting from such a shock cannot be 'palpable.' I am unable (I say it with deference) to follow this reasoning;

<sup>1</sup> 4 Denio, 464.

and further, it seems to me that even were the proposition of law upon which the judgment is based sustainable, the *privy* council were not warranted in assuming as a fact, against the verdict of the jury, and without any special finding in regard to it, that the fright was, in *that* particular case, unaccompanied by any actual physical injury. Further, the judgment assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body. This error pervades the entire judgment. Mr. Beven states in his recent work on Negligence,<sup>1</sup> and I entirely concur with him, that 'the starting point of the reasoning there is that nervous shock and mental shock are identical; and that they are opposed to actual physical injury.'"

This view is in accord with that favored by the California court, which has thus expressed itself in case in which there was a nervous shock without physical impact: "The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected there is a physical injury thereby produced, and if the primal cause of

<sup>1</sup> P. 67 (1st ed.).

this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind."<sup>1</sup>

The Massachusetts court has reached the point where the distinction between the doctrine announced by it in the cases heretofore noticed<sup>2</sup> and that of the California court is almost imperceptible. The action was for a recovery for personal injuries received by the plaintiff on one of the defendant's cars, in consequence of a collision for which the latter was to blame. The plaintiff afterwards had a good deal of suffering of a hysterical nature. The effort of the defendant was to require the plaintiff to prove that the nervous shock was the consequence of the injury; the trial court permitted a recovery for the shock if it resulted from a jar to the nervous system which accompanied the personal injury, both being due to the same cause and to the fault of the defendant. Such action was sustained, the supreme court using this language: We are of opinion that the judge was right, and that further refining would be wrong. As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules.<sup>3</sup>

<sup>1</sup> *Sloane v. Southern California R. Co.*, 111 Cal. 668, 680, 44 Pac. Rep. 320, 32 L. R. A. 193. To the same effect, *Rea v. Balmain New Ferry Co.*, 17 N. S. W. (law) 92; *Hickey v. Welch*, 91 Mo. App. 4, 10; *Watkins v. Kaolin, Manuf. Co.*, 131 N. C. 536, 42 S. E. Rep. 983; *Mack v. South Bound R. Co.*, 53 S. C. 323, 29 S. E. Rep. 905, 40 L. R. A. 679. See 1 Beven on Neg. (2d ed.), p. 76 *et seq.*

A wife may recover damages for

sickness resulting from nervousness occasioned by the verbal abuse of her by her husband while intoxicated, the liquor which caused him to be so having been sold him by the defendant in violation of law. *Kear v. Garrison*, 13 Ohio Ct. Ct. 447.

<sup>2</sup> § 21, note.

<sup>3</sup> *Homans v. Boston E. R. Co.*, 180 Mass. 456, 57 L. R. A. 291, 62 N. E. Rep. 737.

§ 23. **Same subject; an earlier ruling.** Continuing the discussion in the case in the Irish court, the chief baron said: "Possibly, were there no decision the other way, I should from courtesy defer my opinion to that of the privy council, and leave it to the plaintiff to test our decision upon appeal. The very point, however, had been, four years before the decision of the privy council in the *Victorian Railway Commissioners v. Coultas*, decided in this country, first in the common pleas division, then presided over by the present Lord Morris, and afterwards in the court of appeal, in the judgment delivered by the late Sir Edward Sullivan; and it is a sad commentary upon our present system of reporting that a decision so important and so novel has never found its way into our law reports. The case I refer to is *Byrne v. Great Southern and Western Railway Company*. It was tried before me on the 5th and 6th of December, 1882; and a motion to enter a verdict for the defendants was heard in 1883 by the common pleas division; and by the court of appeal in February, 1884. It was an action by the superintendent of the telegraph office at the Limerick Junction station of the defendant's railway. His office consisted of a small building at the end of one of the defendant's sidings, between which and the office there was a permanent buffer strongly fixed. On the 7th December, 1881, through some railway points having been negligently left open, a train entered this siding, broke down the permanent buffer and the wall of the telegraph office. The plaintiff's case was that by hearing the noise, and seeing the wall falling, he sustained a nervous shock which resulted in certain injuries to his health. . . . A verdict having been found for the plaintiff with £325 damages, a motion to set it aside, and enter a verdict for the defendant, on the ground that there was no evidence of injury sufficient to sustain the action, was refused by the common pleas division; and this refusal was affirmed by the court of appeal. That case goes much further than is necessary to sustain the direction here, as in it there was nothing in the nature of impact. As between it, by which we are bound, and the decision of the privy council, by which we are not, I must prefer the former. I desire, however, to add that I entirely concur in the decision in *Bryne v. Great Southern and Western Railway*, and that I

should have been prepared to have arrived at the same conclusion, even without its high authority. . . . In conclusion, then, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury 'accompany such negligence in point of time.'"<sup>1</sup>

§ 23a. **Same subject; *Dulien v. White*.** In 1901 practically the same question came before Kennedy and Phillimore, justices of the king's bench division, and was decided in accordance with the rule of the Irish case. The plaintiff's case was that when she was behind the bar of her husband's publichouse, being then pregnant, the defendant's servant negligently drove a van into the publichouse; that plaintiff in consequence sustained a severe shock and was seriously ill, and at a later time gave premature birth to a child, which, in consequence of the shock sustained by plaintiff, was born an idiot. This last claim was abandoned as a ground for damages because untenable. The action was held sustainable, the result being reached by somewhat different courses of reasoning. Kennedy said, in part: This is an action on the case for negligence, that is to say, for a breach on the part of defendant's servant of the duty to use reasonable and proper care and skill. In order to succeed the plaintiff has to prove resulting damage to herself, and a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect. In re-

<sup>1</sup> *Bell v. Great Northern R. Co.*, 26 L. R. Ir. 428 (1890). The opinion of the chief baron was concurred in by Andrews and Murphy, JJ.

The general doctrine of the Irish court is recognized in *Mack v. South Bound R. Co.*, 52 S. C. 323, 29 S. E. Rep. 905, 40 L. R. A. 679; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203; *Fitz-*

*patrik v. Great Western R. Co.*, 12 Up. Can. Q. B. 645; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320; *Hickey v. Welch*, 91 Mo. App. 4, 10; *Watkins v. Kaolin Manuf. Co.*, 181 N. C. 536, 42 S. E. Rep. 983; *Cooper v. Cal-edonian R. Co.*, 9 Scotch L. T. Rep. 373, 10 id. 104.



gard to the existence of the duty here, there can, I think, be no question. The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property. . . . The only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by negligent driving which does not break his ribs, but shocks his nerves. As regards the facts we must, for the purposes of this argument, assume all that, consistently with the allegations of the statement of claim, can be assumed in plaintiff's favor. Now, what are defendant's arguments against her right to recover damages in this action? First of all, it is argued, fright caused by negligence is not itself a cause of action; *ergo*, none of its consequences can give a cause of action — *Mitchell v. Rochester R. Co.*<sup>1</sup> With all respect to the learned judges who decided that case, I feel a difficulty in following their reasoning. No doubt damage is an essential element in a right of action for negligence. "Fear taken alone" — as Sir Frederick Pollock has stated in his work on Torts<sup>2</sup> — "falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects." That fright, where physical injury is directly produced by it, cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be unreasonable and contrary to the authorities. We have, as reported, decisions which go far, at any rate in my judgment, to negative the correctness of any such contentions.<sup>3</sup> Further, we have directly

<sup>1</sup> 151 N. Y. 107, 45 N. E. Rep. 354, 34 L. R. A. 781, 56 Am. St. 604.

<sup>2</sup> 6th ed., p. 51.

<sup>3</sup> Referring to *Jones v. Boyce*, 1 Stark. 493, where it was ruled that if through the fault of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be liable although the coach was not

turned over. Also to *Harris v. Mobbs* 3 Ex. Div. 268. The facts were that a house-van attached to a steam-plow was left for the night on the side of a highway, four or five feet from the metaled part. During the evening plaintiff's testator drove his horse attached to a cart along the metaled road; the horse was a kicker, but he did not know it. Passing the van he shied at it, kicked, and galloped kicking for 140 yards, got one leg over the shaft, fell and kicked the

in point the decision of the court of appeal and common pleas division in Ireland in the unreported case of *Byrne v. Great Southern & Western R. Co.*,<sup>1</sup> approved of in *Bell v. Great Northern R. Co.*<sup>2</sup> In *Victorian Ry. Commissioners v. Coultas*,<sup>3</sup> which was much relied upon by defendants in the argument before us, the privy council expressly declined to decide that "impact" was necessary. It is not to be taken that, in my view, every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I think, one important limitation. The shock, in order to give a cause of action, must be one which arises from a reasonable fear of immediate personal injuries to the plaintiff. This limitation was applied by Bruce and Wright, JJ., in the unreported case of *Smith v. Johnson & Co.*, where a man was killed negligently by the defendant in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of the negligence.<sup>4</sup> . . . It remains to consider the second form in which defendant's counsel put his objection to the right of the plaintiff to maintain this action. He contends that the damages are too remote, and relies upon the decision of the privy council in *Victorian Ry. Commissioners v. Coultas*. The principal ground of their judgment is formulated in the following sentence: "Damages arising

driver as he rolled out of the cart; he died from the effects of the kick. A verdict having been found in favor of the executor of the deceased on the question of defendant's negligence, it was ruled that such use of the highway was the proximate cause of the injury. The third case referred to is *Wilkins v. Day*, 12 Q. B. Div. 110, the facts being quite similar to those in *Harris v. Mobbs*, and the ruling in accordance with that therein.

These cases are referred to in *Wilkinson v. Downton*, [1897] 2 Q. B. 6, by Wright, J., in respect to their being inconsistent with the *Coultas* case. He said: But I think that those cases

are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage.

<sup>1</sup> § 23.

<sup>2</sup> §§ 21, 22.

<sup>3</sup> See § 21.

<sup>4</sup> To the same effect, *Cleveland, etc. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. Rep. 917.

from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot under such circumstances, their lordships think, be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper." A judgment of the privy council ought, of course, to be treated by this court as entitled to very great weight indeed; but it is not binding upon us; and in venturing, most respectfully, not to follow it in the present case I am fortified by the fact that its correctness was treated by Lord Esher, M. R., in his judgment in *Pugh v. London, etc. R. Co.*<sup>1</sup> as open to question; that it was disapproved of in *Bell v. Great Northern R. Co.* . . . I prefer the decisions of the Irish courts; they seem to me strong and clear authorities for the plaintiff's contention. It is suggested on the part of the defendants that the applicability of the judgment in *Bell v. Great Northern R. Co.* is impaired by the fact that the female plaintiff in that action was a passenger on the defendants' railway and as such had contractual rights. It appears to me that this fact makes no practical difference whatever. There was no special contract; no notice to the railway when they accepted her as a passenger that she was particularly delicate or liable to fright.<sup>2</sup>

Before *Dulien v. White* was decided a different conclusion from that reached therein was arrived at in Massachusetts upon a state of facts less favorable to the defendant than existed in the English case. The declared purpose of the defendant was to damage a house in which the plaintiff was, though it was not her house. In her presence he threw a large stone against the house, after which the plaintiff went into the front room of the house with her little child, and thereafter the defendant wilfully threw a large stone at the house which passed through one of the blinds covering a window in that room and

<sup>1</sup>[1896] 2 Q. B. 248. In this case the plaintiff, while discharging his duty as a signalman in the defendant's employment, endeavored to prevent an accident to a train by signaling to the driver, and the excitement and fright arising from the danger to the train produced a nerv-

ous shock which incapacitated him from employment. It was held that he had been incapacitated by "accident" within the meaning of a policy of accident insurance.

<sup>2</sup>*Dulien v. White*, [1901] 2 K. B. 669.

greatly frightened the plaintiff, who was not touched or struck. The defendant was not liable for the fright or the consequent injury to the plaintiff's health because he had no intention to injure her or her property, did not know of her delicate condition, or that she was in that room.<sup>1</sup> As between these cases the better reason lies with the English case. The Massachusetts case seems a departure from the established principle respecting remote and proximate cause. A later case favors the right of a pupil unlawfully excluded from the public schools to recover for his suffering from the disgrace inflicted upon him.<sup>2</sup>

**§ 24. Same subject; miscellaneous cases.** Though denying the right of recovery for mere fright, neither attended nor followed by any other injury,<sup>3</sup> the supreme court of Texas has sustained a recovery where a miscarriage was caused by a mental shock unaccompanied by any physical violence what ever to the person of the injured woman.<sup>4</sup> In a later case it was alleged by the plaintiff that as the result of a nervous shock or physical injury, or both, caused by the collision of two trains there was developed a nervous affection known as traumatic neurasthenia; as a matter of fact plaintiff was not physically damaged by the collision in the sense that he sustained visible bodily injury. The conclusion reached was that where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof, which questions are for the jury.<sup>5</sup> Proof that a woman was negligently carried beyond her destination and thereby suffered from fright and want of food warrants a finding that the occurrence was the proximate cause of a sickness which immediately followed.<sup>6</sup>

<sup>1</sup> White v. Sander, 168 Mass. 296, 47 N. E. Rep. 90.

<sup>2</sup> Morrison v. Lawrence, 181 Mass. 127, 63 N. E. Rep. 400. See the last paragraph of § 22.

<sup>3</sup> Gulf, etc. Co. v. Trott, 86 Tex. 412, 25 S. W. Rep. 419, 40 Am. St. 866; San Antonio, etc. R. Co. v.

Corley, 87 Tex. 432, 29 S. W. Rep. 231.

<sup>4</sup> Hill v. Kimball, 76 Tex. 210, 13 S. W. Rep. 59, 7 L. R. A. 618.

<sup>5</sup> Gulf, etc. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. Rep. 944, 47 L. R. A. 325.

<sup>6</sup> Texas & Pacific R. v. Gott, 20 Tex. Civ. App. 335, 50 S. W. Rep. 193.

Where the defendant, executing what he thought was a practical joke, said to the plaintiff that her husband had met with an accident, and that his legs were broken, such statement being made with intent that it should be believed, and it was believed, and the plaintiff became ill in consequence of the resulting nervous shock, and not because of previous ill-health, weakness of constitution, predisposition to nervous shock or any other idiosyncrasy, the injury was not too remote.<sup>1</sup> The rule of the New York court of appeals that no recovery can be had for injuries due solely to fright and excitement, unaccompanied by actual, immediate, personal injury, does not apply to cases of wilful tort.<sup>2</sup> If the act or default which causes a nervous shock produces physical injuries, and other such injuries result from the nervous shock, there may be a recovery for the latter injuries as well as the others.<sup>3</sup> In Massachusetts a different view was taken where a passenger upon a street car suffered physical injury from fright caused by the removal of a drunken man, and a slight, unintentional battery of the person resulted. The court said of an instruction to the effect that if there was a fright which operated to the injury of the plaintiff in body or mind and also a physical injury, the jury might take all that happened as one whole, that the defendant was not liable for all the consequences, but only for those of its wrong, which began with the battery, and the consequences thereof were all for which a recovery could be had. This was said with recognition of the difficulty of discriminating.<sup>4</sup> A miscarriage resulting from threats to arrest a debtor husband,<sup>5</sup> by the unlawful imprisonment of a husband,<sup>6</sup> or by wrongfully procuring him to be indicted, is not the reason-

<sup>1</sup> *Wilkinson v. Downton*, [1897] 2 Q. B. 57. The case was admitted to be without precedent, and was distinguished from *Victorian Ry. Commissioners v. Coultas* on the ground that therein was no element of wilful wrong, "nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case."

<sup>2</sup> *Preisner v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890. See § 43.

<sup>3</sup> *Rea v. Balmain New Ferry Co.*, 17 N. S. W. (law) 92.

<sup>4</sup> *Spade v. Lynn & B. R. Co.*, 172 Mass. 488, 52 N. E. Rep. 747, 43 L. R. A. 832. See *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. 17.

<sup>5</sup> *Wulstein v. Mohlman*, 57 N. Y. Super. Ct. 50, 5 N. Y. Supp. 569.

<sup>6</sup> *Ellis v. Cleveland*, 55 Vt. 358. See *Huxley v. Berg*, 1 Starkie, 98.

able or natural result of such acts.<sup>1</sup> One who engages in a quarrel with the husband of a woman who is *enciente*, the quarrel being carried on in her hearing without knowledge of her presence or condition, is not liable for a miscarriage.<sup>2</sup> It has recently been ruled in Pennsylvania that a complaint which alleges that in a collision on the defendant's railroad the cars were thrown off the track and fell on plaintiff's premises and against her dwelling, whereby plaintiff was subjected to great fright, nervous excitement and distress, and her life endangered, does not state a cause of action.<sup>3</sup> An inexperienced youth, without money through defendant's neglect to deliver a message, and compelled to remain penniless among strangers for a week, cannot recover for the anxiety and mortification endured because of his belief that he was looked upon with suspicion.<sup>4</sup>

In a recent North Carolina case<sup>5</sup> it was ruled: We are of the opinion that an action will lie for *physical* injury or disease resulting from fright or nervous shocks caused by negligent acts. From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases it must appear that the defendant must or ought to have known

<sup>1</sup> Hampton v. Jones, 58 Iowa, 317, 12 N. W. Rep. 276.

<sup>2</sup> Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Gaskins v. Runkle, 25 Ind. App. 584, 58 N. E. Rep. 740 (though defendant knew plaintiff was in delicate health and easily excited). See Chicago & N. R. Co. v. Hunerberg, 16 Ill. App. 387.

<sup>3</sup> Ewing v. Pittsburgh, etc. R. Co., 147 Pa. 40, 14 L. R. A. 666, 23 Atl. Rep. 340.

<sup>4</sup> Voegler v. Western U. Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. Rep. 1107.

<sup>5</sup> Watkins v. Kaolin Manuf. Co., 131 N. C. 536, 540, 42 S. E. Rep. 983.

of the plaintiff's perilous position or condition against which he should have to exercise care. It has been ruled in a Texas case that a mother who has been separated from her children because not allowed time to board a train on which they were placed may recover for her mental anguish, and that such liability was not dependent upon the knowledge of the defendant's agent as to the degree of relationship existing between the plaintiff and the children, he knowing that they were in her custody and that she had bought tickets for them.<sup>1</sup>

### § 25. Anticipation of injury as to persons; illustrations.

It has already been stated that though consequential damages to be recovered must be the natural and probable effect of the act complained of, yet it is not requisite that the wrong-doer should be able to anticipate who the sufferer will be. If his act has a tendency to injure some person, or many persons, and finally does in the manner which was beforehand probable cause such injury, it is proximate. This is cogently illustrated by the case of a spring gun set so as to be unwittingly discharged by the first comer.<sup>2</sup> A dealer in drugs, for negligently bottling a poisonous drug and putting it in market labeled as a harmless medicine, is liable to all persons who, without their fault, are injured by using it, though it may have been the subject of many intermediate sales.<sup>3</sup> So a person who, knowing another to be a retailer of illuminating fluids, and that naphtha is explosive and dangerous to life for such use, sells that article to him to be retailed to his customers, he being ignorant of its dangerous properties, is liable to any person buying it of such retailer if injured by its explosion or ignition.<sup>4</sup>

<sup>1</sup> *International, etc. R. Co. v. Anchonda*, 68 S. W. Rep. 743 (Texas Ct. of Civil Appeals).

<sup>2</sup> *Jay v. Whitfield*, 4 Bing. 644; *Bird v. Holbrook*, 4 Bing. 628; *Forney v. Geldmacher*, 75 Mo. 113. See § 17.

<sup>3</sup> *Thomas v. Winchester*, 6 N. Y. 397; *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337; *Norton v. Sewall*, 106 Mass. 143; *George v. Skivington*, L. R. 5 Ex. 1.

<sup>4</sup> *Wellington v. Downer K. O. Co.*, 104 Mass. 64, 8 Am. Rep. 298. See

*Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, 103 Mass. 507.

The sale of an article in itself harmless, and which becomes dangerous only by being used in combination with some other substance, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in a dangerous combination with another

[29] One who knowingly delivers an apparently harmless package containing a dangerous and explosive substance to a common carrier for transportation without giving him notice of its contents is liable for damages caused by its explosion while the carrier is transporting it without knowledge thereof, with such care as is adapted to its apparent nature.<sup>1</sup> The act of keeping a large quantity of gunpowder in a wooden building insufficiently secured, and situate near other buildings, thereby endangering the lives of persons in the vicinity, will subject the person so doing to damages for injuries suffered by any person from its explosion though the fire which causes the explosion is accidental or results from the negligence of a third person.<sup>2</sup> So a person who by public false representations causes another reasonably to act upon them as true in a matter of business is liable to make good any loss the latter may sustain from their falsity.<sup>3</sup> The servants of a railroad company ran its cars, after due warning, over a hose being used to convey water to a burning building, thereby severing it and preventing the extinguishment of the fire. It was held that the company was liable though the hose did not belong to the plaintiffs, and the men in charge of it were not their servants — that the severing of the hose was the proximate cause of the loss.<sup>4</sup> The plaintiff engaged with the defendant to serve on

article, although by mistake the article actually sold is different from that which was intended to be sold. *Davidson v. Nichols*, 11 Allen, 514. See *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Longmeid v. Holliday*, 6 Ex. 761; *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337.

<sup>1</sup> *Boston, etc. R. Co. v. Shanly*, 107 Mass. 568; *Farrant v. Barnes*, 11 C. B. (N. S.) 553.

<sup>2</sup> *Myers v. Malcolm*, 6 Hill, 292; *Kinney v. Koopman*, 116 Ala. 310, 37 L. R. A. 497, 22 So. Rep. 593; *Rudder v. Koopman*, 116 Ala. 332, 22 So. Rep. 601, 37 L. R. A. 489.

<sup>3</sup> *Morse v. Swits*, 19 How. Pr. 275; *Gerhard v. Bates*, 2 El. & B. 476; *Pol-*

*hill v. Walter*, 3 B. & Ad. 114. See *Chester v. Dickerson*, 52 Barb. 349.

<sup>4</sup> *Metallic, etc. Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Atkinson v. Newcastle, etc. Co.*, L. R. 6 Ex. 404. But see *Mott v. Hudson River R. Co.*, 1 Robert. 593.

There is no connection between the wrongful occupation of the bank of a river and a fire, although such occupation may render it impossible for the fire department to obtain water with which to subdue the fire. *Bosch v. Burlington, etc. R. Co.*, 44 Iowa, 402, 25 Am. Rep. 754. See *Brown v. Wabash, etc. R. Co.*, 20 Mo. App. 222; *Jackson v. Nashville, etc. R. Co.*, 13 Lea, 491, 49 Am. Rep. 663; *Railway Co. v. Staley*, 41 Ohio St. 118, 52 Am. Rep. 754.



board the latter's vessel as a common seaman on a specified voyage; breach, that defendant neglected to supply and keep on board a proper supply of medicines as required by a statute, whereby plaintiff's health suffered; held a good cause of action.<sup>1</sup> The sale of a saltpetre cave was rescinded on the ground of the vendor's fraud; the vendee claimed compensation for erections on the premises, for their improvement and use made prior to the discovery of the fraud. The court held that these expenditures were not a loss naturally and proximately resulting from the fraud; that they were not part of the contract, but were made by the complainant of his own choice in consequence of the bargain; that damages could not be given upon the first consequence, and then upon successive subsequent consequences.<sup>2</sup> But it is obvious that the expenditures were a [31] proper item of damages for the fraud, if, as a fact, they were expenditures likely to be made by a purchaser; for then they were a loss which was the natural and proximate consequence of the wrong done.<sup>3</sup> In a late case in Illinois the defendant contracted, without authority as agent, to sell land belonging to the plaintiff, and the latter had been put to the expense of defending an unsuccessful suit on that contract for specific per-

<sup>1</sup> *Couch v. Steel*, 3 El. & B. 402. In this case it was contended that as the act of parliament imposing the duty to keep a proper supply of medicine provided a penalty for neglect of that duty, and that it might be sued for and collected by a common informer, no action at common law would lie for damages resulting from the breach of the statutory duty; but the court sustained the action. *Rowning v. Goodchild*, 2 W. Bl. 906.

<sup>2</sup> *Peyton v. Butler*, 3 Haywood, 141.

<sup>3</sup> In *Peyton v. Butler*, *supra*, the court say: "The failure of a postmaster to deliver a letter giving liberty by a certain day to pay for a lottery ticket, price one dollar, would make him liable for \$20,000 should the ticket afterward turn out to be a prize of \$20,000. In short, the absurdity of such damages is well elucidated by the story of the crockery-

ware peddler who intended by the sale and profits to become a merchant and then a nobleman of the first order, and afterwards to marry the princess." See *Bishop v. Williamson*, 11 Me. 495, where it was held that a postmaster was liable to an action for refusing to deliver a letter according to its address, but delivering it to another, it containing a list of lottery prizes or statement of the drawing; and it appearing that the person receiving the letter, availing himself of the information contained therein, purchased of the plaintiff, who was a vendor of lottery tickets, a ticket that had drawn a prize; the injury was held to be the immediate consequence of the unlawful withholding of the letter, and the proper measure of damages the net amount of the prize.

formance. It was held that he was entitled to recover as damages for his trouble and the expense in making such defense.<sup>1</sup> Where a horse was driven from the stable of its owner and passed from a highway to a vacant lot adjoining the premises of its owner, and there killed one of a number of children at play, the owner of the horse was liable.<sup>2</sup>

§ 26. **Consequential damages in highway cases.** The general rule is that municipal corporations are bound to keep their streets in a reasonably safe condition for travel. But *quasi*-municipal corporations, such as counties, townships and New England towns, are not under such obligation unless it is imposed by statute,<sup>3</sup> and clearly expressed therein.<sup>4</sup> Such statutes are strictly construed in some states and the right of recovery is denied, especially in Maine and Massachusetts, under circumstances which do not prevent a recovery in other jurisdictions.<sup>5</sup> This, it is probable, has been the result of the language employed in the statutes of those states, which are construed to relieve from liability if the accident was not directly and solely the effect of the insufficiency of the highway.<sup>6</sup> It is said<sup>7</sup> that "some portion of the harness or carriage may be defective and unsafe, and the accident may be the

<sup>1</sup> *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

<sup>2</sup> *Mills v. Bunke*, 59 App. Div. 39, 69 N. Y. Supp. 96.

<sup>3</sup> 2 Dillon, Mun. Corp., § 996.

<sup>4</sup> *Barnett v. Contra Costa County*, 67 Cal. 77, 7 Pac. Rep. 177.

<sup>5</sup> The construction given the statutes in those states is approved in a recent Connecticut case, it being held that the consequence of the failure of a town to keep its highway in repair is to impose upon it the statutory penalty, and that the right to recover it may be defeated by any concurring wrong of a third person and a defect in the way. In such a case the injury is not caused by the defect. *Bartram v. Sharon*, 71 Conn. 686, 13 Atl. Rep. 143, 71 Am. St. 225, 46 L. R. A. 144. *Contra*, *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. Rep. 676.

<sup>6</sup> *Marble v. Worcester*, 4 Gray, 395; *Aldrich v. Gorham*, 77 Me. 287; *Moulton v. Sanford*, 51 Me. 127; *Davis v. Dudley*, 4 Allen, 557.

Liability is limited to the direct and immediate results of the injury, and the common-law rule that a recovery may be had for the natural and proximate result does not apply. Hence where an injury resulted from a defect in a highway, and the person injured sustained a subsequent injury by undertaking to use the limb injured on the highway, such later injury could not be recovered for. *Raymond v. Haverhill*, 168 Mass. 382, 47 N. E. Rep. 101. The contrary has been held in Wisconsin. *Wieting v. Millston*, 77 Wis. 523, 46 N. W. Rep. 879. The Massachusetts court refused to follow this case.

<sup>7</sup> *Aldrich v. Gorham*, 77 Me. 287.

combined result of the defect in the harness or carriage and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not liable.<sup>1</sup> The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks away from his driver and escapes from all control, while traveling on the way, and afterwards, while thus free from the management and control of the driver, meets with an injury through a defect in the way.<sup>2</sup> . . . But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. 'Everything which induces or influences an accident does not necessarily and legally cause it.'<sup>3</sup> And not only is it the doctrine of the court in our own state, but also in Massachusetts, that if a horse, well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver or becoming unmanageable, if he is in fact only momentarily not controlled; and that if, while thus momentarily swerving or shying, he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and a recovery may be had for such injury."<sup>4</sup> This is also the rule in Wisconsin<sup>5</sup> and in other states.<sup>6</sup> The Wisconsin case first cited appears to go

<sup>1</sup> *Contra*, Vogel v. West Plains, 73 Mo. App. 588, citing Bassett v. St. Joseph, 53 Mo. 300; Brennan v. St. Louis, 92 Mo. 482; Vogelgesang v. St. Louis, 40 S. W. Rep. 653, 139 Mo. 127.

<sup>2</sup> Davis v. Dudley, 4 Allen, 557; Moulton v. Sanford, 51 Me. 127; Marble v. Worcester, 4 Gray, 395.

<sup>3</sup> Spaulding v. Winslow, 74 Me. 534.

<sup>4</sup> *Id.*; Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91; Stone v. Hubbard-

ston, 100 Mass. 55; Bemis v. Arlington, 114 Mass. 508; Wright v. Templeton, 132 Mass. 50; Morsman v. Rockland, 91 Me. 264, 39 Atl. Rep. 995.

<sup>5</sup> Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. Rep. 575; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568.

<sup>6</sup> Rockford v. Russell, 9 Ill. App. 229; Joliet v. Verley, 35 Ill. 58; Denver v. Johnson, 8 Colo. App. 384, 46 Pac.

beyond the cases in Maine and Massachusetts. The fright of the horses was caused by something not in the highway, and for which the city authorities were not responsible. Nevertheless the absence of a railing to a bridge was held the proximate cause of the accident. The distinction made in Maine and Massachusetts as to the duration of the loss of control of a horse by its driver does not appear to be taken in many states,<sup>1</sup> nor in Ontario.<sup>2</sup> The rule in these jurisdictions is that when an accident happens from a defect existing in a highway as the result of negligence, the fact that the horse was at the time uncontrollable or running away is not a defense to an action to recover for the injury. The Connecticut court say: "The failure of a traveler to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and

Rep. 621; *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 169; *Burns v. Yonkers*, 83 Hun. 211, 31 N. Y. Supp. 757 (the horse balked and backed the vehicle off the highway down a steep and unguarded bank); *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. Rep. 548; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. Rep. 932; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. Rep. 676; *Cage v. Franklin*, 8 Pa. Super. Ct. 89; *Yoders v. Amwell*, 172 Pa. 447, 51 Am. St. 750, 33 Atl. Rep. 1017; *Davis v. Snyder*, 196 Pa. 273, 46 Atl. Rep. 301; *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. Rep. 643; *Rohrbough v. Barbour County Court*, 39 W. Va. 472, 20 S. E. Rep. 565, 45 Am. St. 925; *Knouff v. Logansport*, 26 Ind. App. 202, 59 N. E. Rep. 347. *Contra*, *Brown v. Laurens County*, 38 S. C. 282, 17 S. E. Rep. 21.

Where the plaintiff was driving over a defective bridge and, without his fault, his horse broke through the bridge, and plaintiff, in trying to ex-

tricate him, was injured by a blow from the horse, the defect was the proximate cause of the injury. *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Stickney v. Maidstone*, 30 Vt. 378, 73 Am. Dec. 312; *McKelvin v. Loudon*, 22 Ont. 70.

<sup>1</sup> *Baltimore & H. Turnpike Co. v. Bateman*, 68 Md. 389, 13 Atl. Rep. 54, 6 Am. St. 449; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Putman v. New York, etc. R. Co.*, 47 Hun. 439, 442; *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33; *Hull v. Kansas*, 54 Mo. 598, 14 Am. Rep. 487; *Hunt v. Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Byerly v. Anamosa*, 79 Iowa, 204, 44 N. W. Rep. 359; *Manderschid v. Dubuque*, 25 Iowa, 108; *Ward v. North Haven*, 43 Conn. 148; *Campbell v. Stillwater*, 32 Minn. 308, 20 N. W. Rep. 320.

<sup>2</sup> *Sherwood v. Hamilton*, 37 Up. Can. Q. B. 410.

only negligence. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the negligence of the defendants, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendants are liable." Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before arriving at the place of injury affect the liability of the defendant.<sup>1</sup> But this principle is not to be extended to a case in which the horse is left tied to a post, breaks away therefrom and goes over an unguarded bank, where he would not have been driven by a prudent driver.<sup>2</sup> It may, however, apply where the first cause leading to the injury happened outside of the defendant's road, as where the horse became uncontrollable through fright upon a road for which the defendants were not responsible and ran from there upon private property, thence to the original road, and finally and without a driver upon the defendants' turnpike.<sup>3</sup> In a Wisconsin case<sup>4</sup> the injured horse took fright and escaped from his driver while in a field and ran from thence to the highway, which was out of repair. The court very properly held that towns are not bound to provide roads for runaway horses; but if the highway is so defective as to cause a team to become frightened the town is liable.<sup>5</sup> If a traveler, while using due care, is exposed to imminent danger by a defect in the highway, and to avoid the probable consequences of coming in contact with the defect and as a reasonable precaution turns his horse, whereby his vehicle is brought into collision with another vehicle, which would not have happened if the horse had not been turned, the defect may be regarded as the sole cause of the injury.<sup>6</sup>

<sup>1</sup> *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33, approved in *Ring v. Cohoes*, 77 N. Y. 83, 88, 33 Am. Rep. 574; *Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. Rep. 969, 18 L. R. A. 750.

<sup>2</sup> *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82, 15 N. W. Rep. 267.

<sup>3</sup> *Baldwin v. Greenwoods Turnpike Co.*, *supra*.

<sup>4</sup> *Jackson v. Bellevieu*, 30 Wis. 250; *Schillinger v. Verona*, 96 Wis. 456, 71 N. W. Rep. 888.

<sup>5</sup> *Kelley v. Fond du Lac*, 31 Wis. 179; *Hodge v. Bennington*, 43 Vt. 451.

<sup>6</sup> *Flagg v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674, 8 N. E. Rep. 42.

It is difficult to harmonize the Massachusetts cases on the question of consequential damages for injuries on highways. It was ruled in *Palmer v. Andover*, 2 Cush. 600, that a town was liable where the primary cause of the injury was a pure accident: a nut getting loose and dropping from a bolt, the horses were

If there is negligence in failing to erect a barrier for the protection of pedestrians, one injured may recover though the primary cause of his injury was the sudden going out of the

detached from a carriage while descending a hill, at the foot of which the road abruptly turned to the right on the bank of a mill pond, into which, by going straight on, the carriage plunged, on account of the absence of any railing. The court say: "The . . . question . . . whether, in case of an injury received while traveling upon a public way, shown to be defective, but where the accident or injury is attributable in part to a defect in the carriage or harness, but occurring under such circumstances as show that the plaintiff was chargeable with no fault or negligence in the matter, the town is liable for the damage, is one not free from difficulty. Against maintaining such action, it is strongly urged that the injury is not fairly imputable to the defect in the highway; and inasmuch as it resulted, at least in part, from causes for which the town was not responsible, and over which it had no control, the town should not be chargeable with damages therefor. If the objection was that the injury was caused by the combined effect of an obstruction or want of repair in the road, and the want of ordinary care, diligence or skill on the part of the plaintiff in reference to his harness, his horses or his carriage, or the use of the road, it would be very clear that the plaintiff could not recover. He must be without fault in this respect; and if not so, although the highway be out of repair, the town is not liable. But is the like effect to follow when there is a defect in the road, but the accident or injury is attributable in part to a defect in the carriage or harness, which defect was unknown

to the plaintiff, and which was of such a character that it might have existed, and yet no fault or negligence be chargeable by reason thereof to the plaintiff? We should be slow to adopt or sanction any principles in reference to this class of actions that would in so many cases render the statute nugatory. If the circumstance that some accident or casualty occurred, as the primary cause, and which by reason of a defect in the road, and through their combined operation, caused the damage to the plaintiff, would deprive the party of recovering damages, the protection to the traveler would be very much restricted. It is the ordinary course of events, and consistent with a reasonable degree of prudence on the part of the traveler, that accidents will occur; horses may be frightened, the harness may break, a bolt or screw may be dropped. To guard against damage by such accidents the law requires suitable railings and barriers, a proper width of the road, and whatever may be reasonably required for the safety of the traveler. It seems to us that when the loss is the combined result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault or negligence on the part of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable." In *Davis v. Dudley*, 4 Allen, 557 (decided seven years after *Palmer v. Andover*, *supra*), a town was held not to be responsible in damages if a horse on becoming accidentally frightened breaks away

lights in the street lamps.<sup>1</sup> It is not a defense to a city that another contributed, either before or after its default, or concurrently therewith, in producing the damage.<sup>2</sup>

§ 27. **Imputed negligence.** It was formerly judicially declared to be the law in England that the negligence of the driver of a public conveyance was imputable to a passenger therein, although the latter exercised no control over the former.<sup>3</sup> This doctrine was not authoritatively disapproved of, although it was much commented on and shaken, until 1888, when it came before the house of lords in *Mills v. Armstrong*,<sup>4</sup> with the result that the whole foundation on which it rested was removed. The theory has but little support in the American cases: except in *Wisconsin*<sup>5</sup> all the recent ad-

from his driver, and afterwards, while running at large, meets with an injury through a defect in the highway. It is declared that this case does not conflict with the other, *Merrick, J.*, saying: "The facts in the present case are widely different, and afford no occasion for the application of the doctrine by which, in the decision of that case, the court were influenced and controlled. Here the accident and injury were not coincident; but were separate and produced by separate causes. The effect of the accident as procuring cause was complete when the horse, frightened by the falling of the cross-bar and thills upon his heels, became detached from the sleigh and had escaped from the control of the driver. The blind violence of the animal, acting without guidance or direction, became, in the course and order of incidents which ensued, the supervening and proximate cause of the injury inflicted by his running against a wood-pile, which constituted an unlawful obstruction and defect in the highway. In this succession of events, it happens that the accident placed the owner in a situation where it was out of his power to exercise due care over the horse while this new cause

was in operation, and until it had contributed to produce the disaster by which his leg was broken." These cases and others in Massachusetts are criticised and contrasted in an interesting manner in *Toms v. Whitby*, 35 Up. Can. Q. B. 195, where a different rule prevailed. The substance of the opinion in the case referred to is given in the first edition of this work, vol. 1, pp. 38-47.

<sup>1</sup> *Clay Centre v. Jevons*, 2 Kan. App. 568, 44 Pac. Rep. 745.

Where a team was being driven along a road and the tugs became loosened and fell from the whiffletrees, the pole fell to the ground, the horses ran away, and the wagon went down an unguarded slope, the primary cause of the resulting injury was the detaching of the tugs, and not the absence of a barrier. *Card v. Columbia*, 191 Pa. 254, 43 Atl. Rep. 217.

<sup>2</sup> *McClure v. Sparta*, 84 Wis. 269, 54 N. W. Rep. 337, 36 Am. St. 924. See *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. Rep. 522, 12 L. R. A. 249.

<sup>3</sup> *Thorogood v. Bryan*, 8 C. B. 115 (1849).

<sup>4</sup> 13 App. Cas. 1.

<sup>5</sup> *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 id. 422, 2 N. W. Rep. 783.

judications are hostile to it.<sup>1</sup> The principle deducible from these decisions, say the supreme court of Indiana, is that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified may have contributed thereto.<sup>2</sup> But this is not the rule if the person who is riding with another knows of and acquiesces in the other's purpose to commit a wrong against a third party. In such a case, in the absence of exculpatory evidence, the passenger will be presumed to be co-operating with the driver.<sup>3</sup> It is said, *arguendo*, in Vermont, and is held in some states that the rule does not apply to an action for the benefit of a parent, to recover for the death of a child, the

<sup>1</sup> Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391; Wabash, etc. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Carlisle v. Brisbane, 113 Pa. 544, 6 Atl. Rep. 372; Railway Co. v. Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 1 N. E. Rep. 519; Philadelphia, etc. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. Rep. 105; Cuddy v. Horn, 46 Mich. 596, 10 N. W. Rep. 32, 41 Am. Rep. 178; New York, etc. R. Co. v. Steinbrenner, 47 N. J. L. 161; Nesbit v. Garner, 75 Iowa, 314, 9 Am. St. 486, 39 N. W. Rep. 516; Masterson v. New York C. etc. R. Co., 84 N. Y. 247; Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. 827, 18 N. E. Rep. 452, 1 L. R. A. 152; Sheffield v. Central U. Telephone Co., 36 Fed. Rep. 164; Strauss v. Newburgh Electric R. Co., 6 App. Div. 264, 39 N. Y. Supp. 998; Hennessey v. Brooklyn City R. Co., 6 App. Div. 206, 39 N. Y. Supp. 805; Zimmerman v. Union R. Co., 28 App. Div. 445, 51 N. Y. Supp. 1; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. Rep. 676; Faust v. Philadelphia & R. R. Co., 191 Pa. 420,

43 Atl. Rep. 329; Bamberger v. Citizens' Street R. Co., 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. 909, 31 S. W. Rep. 163; Missouri, etc. R. Co. v. Rogers, 91 Tex. 52, 40 S. W. Rep. 956; Ploof v. Burlington Traction Co., 70 Vt. 509, 41 Atl. Rep. 1017, 43 L. R. A. 108; Norfolk & W. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. 718, 13 S. E. Rep. 454; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. Rep. 319; Roth v. Union Depot Co., 13 Wash. 525, 31 L. R. A. 855, 43 Pac. Rep. 641, 44 id. 253; Turnpike Co. v. Yates, 108 Tenn. 428, 438, 67 S. W. Rep. 69; Union Pacific R. Co. v. Lapsley, 51 Fed. Rep. 174, 2 C. C. A. 149, 16 L. R. A. 800. See Jones v. Scullard, [1898] 2 Q. B. 565, for the rule where the servant of one person is hired by another.

<sup>2</sup> Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. 827, 18 N. E. Rep. 452.

<sup>3</sup> Brannen v. Kokomo, etc. Co., 115 Ind. 115, 7 Am. St. 411, 17 N. E. Rep. 202.



statute providing for the recovery of such damages as are just.<sup>1</sup> Other courts hold the contrary view where the action for the death of the child is brought by his personal representative.<sup>2</sup> The Connecticut court has refused to apply the rule in an action to recover for injuries sustained by a defective highway, the statute authorizing a recovery in such a case by any person injured by means of a defect in the highway. It is said that the liability is penal in its nature, and does not extend to a case in which the injuries resulted to a traveler from the defect and the culpable negligence of a fellow traveler.<sup>3</sup> There is probably no dissent from the doctrine that one who is bound to care for and protect a child cannot profit because of the neglect of his duty.<sup>4</sup>

§ 28. **Particular injury need not be foreseen.** It will [47] appear from a perusal of the cases in which consequential damages have been allowed and from the principle on which they are recovered, that at the time the wrongful act is done it need not be certain that such damages will ensue. It is only essential that the act have a tendency and be likely to cause such damages, not that they be certain to follow; in this respect they are generally contingent, and by possibility may not happen.<sup>5</sup> If one remove or destroy a fence inclosing a

<sup>1</sup> *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 41 Atl. Rep. 1017, 43 L. R. A. 108; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. Rep. 917; *Atlanta & C. Air Line R. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. Rep. 550, 26 L. R. A. 553.

<sup>2</sup> *Norfolk & W. R. Co. v. Grose-close*, 88 Va. 267, 13 S. E. Rep. 454, 29 Am. St. 718; *Wymore v. Mahaska County*, 78 Iowa, 396, 16 Am. St. 449, 43 N. W. Rep. 264.

<sup>3</sup> *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. 225, 46 L. R. A. 144, 43 Atl. Rep. 143. See *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. Rep. 676.

<sup>4</sup> *Atlanta & C. Air Line R. Co. v. Gravitt*, *supra*, and cases cited.

<sup>5</sup> *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544, 565, 14 N. E. Rep. 572, 16 id. 197; *Wabash, etc. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. 193, 14

N. E. Rep. 391; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911; *Hill v. Winsor*, 118 Mass. 251; *Barbee v. Reese*, 60 Miss. 906; *Christianson v. Chicago, etc. R. Co.*, 67 Minn. 94, 69 N. W. Rep. 640; *Rea v. Bailmain New Ferry Co.*, 17 N. S. W. (law) 92; *Henderson v. O'Halloran*, — Ky. —, 24 Ky. L. Rep. 995, 20 S. W. Rep. 662.

In *Sneesby v. Lancashire & Y. R. Co.*, 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of defendant's railway on a level, and when the cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding amongst them, which separated them from the drovers and so fright-

field, or open a gap in it, there is a possibility that animals confined there may not escape so as to encounter danger outside<sup>1</sup> or subject the owner to expense in recovering them;<sup>2</sup> and it is possible that other cattle will not trespass upon such field to destroy a crop there,<sup>3</sup> or to do injury to an animal there,<sup>4</sup> or to receive injury;<sup>5</sup> but the wrong done in opening such inclosure is so likely to lead to these injurious results that they are proximate if they occur. Opening the fence does not cause an animal to pass through it; it offers the opportunity, exposes to injury property within or property outside of it, or both. It is in this manner that the primary and efficient cause generally produces consequential damages. The party injured in his person or property is by the wrongful act of another or his culpable negligence exposed or left in exposure from some cause imminent and fairly obvious in ex-

posed them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence on to another track of the defendant's railway and were killed. The result was not too remote. The court said that the result of the negligence was twofold: first, that the trucks separated the cattle, and second, that the cattle were frightened and became infuriated and were driven to act as they would not have done in their natural state; that everything that occurred or was done after that must be taken to have occurred or been done continuously; and that it was no answer to say that the fence was imperfect, for the question would have been the same had there been no fence there. Compare *West Mahanoy v. Watson*, 116 Pa. 344, 9 Atl. Rep. 430, 2 Am. St. 604. See *Rucker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Alabama, etc. R. Co. v. Chapman*, 80 Ala. 615, 2 So. Rep. 738; *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. Rep. 585, 45 L. R. A. 87.

<sup>1</sup> *Powell v. Salisbury*, 2 Y. & J. 391; *White v. McNett*, 33 N. Y. 371; *Welch v. Piercy*, 7 Ired. 365; *Halestrap v. Gregory*, [1895] 1 Q. B. 561.

The act of opening a fence which incloses a pasture in which horses are kept is the proximate cause of injury to them, if they escape and come in contact with a barbed-wire fence, such material being largely used for fencing in the adjacent country. *West v. Ward*, 77 Iowa, 323, 14 Am. St. 284, 42 N. W. Rep. 309.

<sup>2</sup> *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532.

<sup>3</sup> *Scott v. Kenton*, 81 Ill. 96.

Injury done by trespassing animals owned by a third person is not the direct result of the destruction of the fence which inclosed the crops damaged. *Berry v. San Francisco, etc. R. Co.*, 50 Cal. 435, approved in *Durgin v. Neal*, 82 Cal. 595, 23 Pac. Rep. 133.

<sup>4</sup> *Lee v. Riley*, 18 C. B. (N. S.) 722.

<sup>5</sup> *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

isting circumstances or otherwise, and through such exposure the injury ultimately and proximately reaches him. The [48] wrongful act is the cause of the injury in the natural and probable course of events by subjecting the party injured unlawfully to other and dependent causes from which the injury directly proceeds. In this way at least the relation of cause and effect must be established between the wrongful act and the injurious consequence.<sup>1</sup> The owner of a vessel employed in building a sea wall was given by the owner of the wall the exclusive right to its use as a place of safety for his vessel. The master of another vessel, without permission, placed her behind the wall and refused to move her when requested, the former desiring to put his there as a place of safety against a storm. This vessel was sunk by the storm while thus excluded from that position. The sinking was held to be the proximate consequence of being denied the shelter of the wall.<sup>2</sup> It is not required that the damages be foreseen, as consequential damages from a breach of contract must be contemplated by the parties when they enter into it.<sup>3</sup> Nor, on the other hand, will the wrong-doer be liable for every possible damage which may indirectly ensue from his misconduct.<sup>4</sup>

**§ 29. The act complained of must be the efficient cause.** The defendant's misconduct must be the efficient cause and the injury which follows must be such as ought to have been foreseen as a probable consequence in the light of surrounding circumstances. There is generally another and more immediate cause of the injury; the primary cause, to be deemed responsible and efficient for the purpose of recovering damages,

<sup>1</sup> *Olmsted v. Brown*, 12 Barb. 657; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. Rep. 559, 12 L. R. A. 257; *Christianson v. Chicago, etc. R. Co.*, 67 Minn. 94, 69 N. W. Rep. 640; *Beopple v. Railroad*, 104 Tenn. 420, 58 S. W. Rep. 231; *Gilman v. Noyes*, 57 N. H. 627.

The negligence of the proprietor of a store in failing to guard an elevator shaft, and not the stumbling of a customer, is the proximate cause of the latter's death from falling into the shaft after stumbling

over a platform upon which the goods he was inspecting were displayed, they being near the shaft. *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. Rep. 1086.

<sup>2</sup> *Derry v. Flitner*, 118 Mass. 131; *Tinsman v. Belvidere D. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565.

<sup>3</sup> *Bowas v. Pioneer Tow Line*, 2 Sawyer, 21.

<sup>4</sup> *Beach v. Ranney*, 2 Hill, 314; *Central R. Co. v. Dorsey*, — Ga. —, 42 S. E. Rep. 1024.

must have directly set in motion an intervening and more immediate agency or be directly in fault for the exposure of the injured party to its injurious influence. The wrongful refusal of a corporation to register among its members one who has purchased shares of its stock on the ground that there was a debt due it from the original owner does not make it liable to such owner for a decline in their value occurring between the times when the transfer ought to have been registered and when in fact it was registered, such decline damaging the transferee because of the terms of the contract between him and the transferee, of which the company had no notice. There is no connection between the market price of the shares and the act of the corporation.<sup>1</sup> A bridge erected over a slough of a river and a part of the highway from the business part of a city to a levee on the river became impassable for [49] want of repairs, by reason of which the owner of a lot of wood which had been collected at the levee for transportation over the bridge was unable to so transport it. While lying there under these circumstances it was washed away by a freshet. The damages were held too remote to be the consequence of the neglect to repair the bridge.<sup>2</sup> The defendant's negligence did not consequentially cause the loss of the wood, if it could be moved to a place of safety in another direction; nor was the loss by freshet proximate unless, according to the general experience, it was a probable occurrence. The loss of an office as the result of an assault and battery has been held too remote, and too much the result of other and independent causes to be taken into consideration.<sup>3</sup> So where the defendant libeled a concert singer who, in consequence, refused to sing at the plaintiff's oratorio for fear of being badly received, it was held that this damage to the plaintiff was not sufficiently connected with the act of the defendant. The re-

<sup>1</sup> *Skinner v. London Marine Ins. Co.*, 14 Q. B. Div. 882. See *Bourdette v. Seward*, 107 La. 258, 31 So. Rep. 630, holding a similar rule where inspection of corporate books was denied a stockholder.

<sup>2</sup> *Dubuque, etc. Ass'n v. Dubuque*, 30 Iowa, 176.

<sup>3</sup> *Brown v. Cummings*, 7 Allen, 507; *Boyce v. Bayliffe*, 1 Camp. 58; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Burton v. Pinkerton*, L. R. 2 Ex. 340; *Smith v. Gentry*, 20 Ky. L. Rep. 171, 45 S. W. Rep. 515, 42 L. R. A. 303, citing the text.

fusal to sing might have proceeded from groundless apprehension or caprice, or some other cause altogether different than that alleged.<sup>1</sup>

It is not the natural result of enticing a minor daughter

<sup>1</sup> *Ashley v. Harrison*, 1 Esp. 48. In *Taylor v. Neri*, id. 386, it appeared that the defendant beat an actor and thereby disabled and prevented him from performing his engagement with the plaintiff. It was held that the injury to the manager was too remote.

These two cases came under criticism in *Lumley v. Gye*, 2 El. & B. 216, which was an action by the manager of a theatre against the manager of a rival theatre for procuring a singer to break her engagement. The circumstance that the plaintiff had an action against the singer herself upon her agreement was overruled, and the plaintiff recovered on the principle that the defendant incurred the same liability for interfering with such a servant as any other. Wightman, J., said: "In the present case there is the malicious procurement of Miss W. to break her contract, and the consequent loss to the plaintiff. Why, then, may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the *injuria* and the *damnum*; but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking of her contract was the spontaneous act of Miss W. herself, who was under no obligation to yield to the persuasion or procurement of the defendant. Another case of *Vicars v. Wilcocks*, 8 East, 1, which, though it has been brought into question, has never been directly over-

ruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground suggested by Lord Chief Justice Tindal in *Ward v. Weeks*, 7 Bing. 211, 215. that the damage in that case, as well as in *Vicars v. Wilcocks*, was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button*, 2 Cr. M. & R. 707, in which it was held the action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case that as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was a mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the court held the action maintainable though the defendant did make the claim as of right, he having done so maliciously, and without any reasonable cause, and the damage accruing thereby."

The doctrine of *Vicars v. Wilcocks* and cases of that class does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for

from her home, against her father's objections, and employing her to work in defendant's home, that she should be seduced by the latter's son.<sup>1</sup> The killing of plaintiff's son, without wilful intent to injure plaintiff, does not give the latter a cause of action for the breach of a contract on the son's part to support his father.<sup>2</sup> There is no connection between defamatory statements made respecting one who desires employment and is required to give a bond to his employer and the refusal of a company to give such bond because of such statements; between defendant's wrong and plaintiff's damage the voluntary act of a third party intervened, and such act was the proximate cause of the loss of employment.<sup>3</sup> A claim of damages for goods frozen because defendant had taken a false and spurious deed of land, thereby preventing the digging of a cellar in which to put the goods, cannot be allowed.<sup>4</sup> Defendant negligently stored oil on a wooden platform of its freight house in a town, and had done so for such a length of time that the platform and the ground beneath it had become saturated with oil. A fire was caused by throwing a match upon the ground under the platform by a person not connected with the defendant, but who was rightfully on the premises. It was ruled that the defendant was not liable for the loss of buildings near the freight house as the result of the fire.<sup>5</sup> But the rule is otherwise if the substance negligently exposed is liable to ignite spontaneously and produce damage.<sup>6</sup>

in such instances damage is regarded as occasioned by the wrongful cause and not by those which are not wrongful; as where one who desires to make the customer of another believe that the work done for him is badly done, and to accomplish that end loosens a shoe put on the customer's horse. In such case the person who defames the horseshoer is responsible to him for the loss of the patronage which may result from his act. *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

<sup>1</sup> *Stewart v. Strong*, 20 Ind. App. 44, 50 N. E. Rep. 95.

<sup>2</sup> *Brink v. Wabash R. Co.*, 160 Mo.

87, 60 S. W. Rep. 1058, 83 Am. St. 459; *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278; *Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571.

<sup>3</sup> *McDonald v. Edwards*, 20 N. Y. Misc. 523, 46 N. Y. Supp. 672; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 23 S. E. Rep. 264, 53 Am. St. 611, 30 L. R. A. 257.

<sup>4</sup> *Cormier v. Bourque*, 32 N. B. 283.

<sup>5</sup> *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. Rep. 1, 41 L. R. A. 794.

<sup>6</sup> *Vaughan v. Menlove*, 3 Bing. N. C. 468.

§ 30. **Same subject.** A lease of a canal was made by [50] commissioners of navigation under a statute providing that if the lessee should permit the work to be out of repair the commissioners should give him notice to repair, and on his neglecting to make the repairs they might make them and pay the expenses out of the tolls. A lock forming part of the canal fell and detained a barge. In an action for that detention against the commissioners for neglecting to give notice to the lessee to repair, it was held that the action would not lie because the detention was not a damage naturally flowing from the alleged neglect, it not being shown that if such notice had been given the lessee would have repaired or that the commissioners would have done so. Pollock, C. B.: "To say that the damage could be the consequence of the wrongful act or omission is, in our judgment, to assert a false proposition of law. The surmise is,—if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved; but it is not the proximate, necessary or natural result of not giving notice. The not giving notice is not sufficient to bring about the result; the giving of it would not be sufficient to hinder it."<sup>1</sup> Here the immediate cause of the detention was the obstruction and want of repair of the canal; the alleged wrong of the defendant did not [51] put the canal out of repair, and as the commissioners were not absolutely required to do anything but give notice, as a step towards repair, it could not be assumed as matter of law that doing so would have caused the repair to be made. The relation of cause and effect between the wrongful act and the alleged injurious consequence was not established. It is indispensable that the plaintiff should show not only that he has sustained *damage*, and that the defendant has committed a *tort*, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained.<sup>2</sup>

<sup>1</sup> Walker v. Goe, 3 H. & N. 395.

20 Ky. L. Rep. 171, 45 S. W. Rep. 515,

<sup>2</sup> Lamb v. Stone, 11 Pick. 527; Vernon v. Keys, 12 East, 632; Morgan v. Bliss, 2 Mass. 111; Harrison v. Redden, 53 Kan. 265, 36 Pac. Rep. 325, citing the text; Smith v. Gentry,

42 L. R. A. 302, citing the text; Johnson v. Western U. Tel. Co., 79 Miss. 58, 29 So. Rep. 787. See Mitchell v. Western U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. Rep. 1016.

An action on the case was brought by a creditor against his debtor and another for confederating together to prevent the plaintiff from obtaining security for the payment of his debt; they were charged with having accomplished that wrong by removing the debtor's property from his possession to that of his confederate, who secured it or its proceeds, and thus prevented its attachment. The plaintiff had obtained judgment, and the debtor had relieved himself from the execution against his body by taking the poor debtor's oath, and the debt remained wholly unpaid. The case was proved except the conspiracy. It was held that the action could not be maintained. Among other reasons for this conclusion was the uncertainty of the plaintiff's damage. Metcalf, J., said: "How could this plaintiff prove that he suffered any damage from the acts of the defendant which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies and can be nothing more than a matter of conjecture."<sup>1</sup>

The causation between a fire negligently started and which is supposed to have been extinguished, but which starts up again, is not severed by the non-action of a third person after the second fire starts. Although such failure to act is culpable, it neither adds to the original force nor gives it new direction, and hence in tracing back the line of causation it will not be noticed as a potent agency. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

<sup>1</sup> *Wellington v. Small*, 3 Cush. 145.

In *Randall v. Hazelton*, 12 Allen, 412, a mortgagee voluntarily promised the mortgagor not to act under

a power of sale contained in a mortgage without a notice to him; he was afterwards induced by the falsehood of the defendants to assign the mortgage to one M. for their benefit, and then caused such foreclosure to take place in a manner to avoid notice reaching the plaintiff, who was compelled to pay \$500 to get a deed of the property. The case was determined on demurrer against the plaintiff. The promise of the mortgagee was gratuitous, and therefore neither he nor an assignee would do any legal wrong by foreclosing according to the power in the mortgage. The damage was held to re-



§ 31. **Same subject.** A demurrer was sustained to a [52] declaration which stated that the defendant and a confederate conspired to and did obtain possession of a portion of the plaintiff's premises by falsely pretending that it was wanted

sult from the foreclosure and not from the alleged wrong. "Damages," say the court, "can never be recovered where they result from the lawful act of the defendant." The benefit of that gratuitous promise was not a matter of legal right, and though it would have been kept but for the defendant's fraudulent contract, and the plaintiff saved from the loss which resulted from the sale, yet that fraud was not actionable because it did not affect any legal right; it could not be said to be an invasion of such a right "to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking." The court say: "In the *Tunbridge-Wells Dippers*' case, 2 Wils. 414, while the court remark that there was a real damage in depriving the plaintiff of some gratuity, they also say in the same sentence that the injury was by disturbing the dippers in the exercise of their right or employment, which it seems by some statutes they were entitled to." *Hutchins v. Hutchins*, 7 Hill, 104; *Burton v. Henry*, 90 Ala. 281, 7 So. Rep. 925.

In *Bradley v. Fuller*, 118 Mass. 239, the court stated the material allegations of the declaration, which was held, on demurrer, not to state a cause of action, to be that the defendant orally represented to the plaintiff that a corporation of which he was treasurer, and whose overdue note the plaintiff then held, owed no other debts, and had no attachments upon its property; that the representation was fraudulently and falsely made for the purpose of inducing the plaintiff not to commence suit upon his note until the corporate

property could be placed beyond the reach of attachment by the plaintiff; that all the property of the company was afterwards attached and sold on execution upon another debt; and that the plaintiff, induced by the representations not to enforce his claim by suit, lost his debt against the company. In one count the plaintiff stated that he "was induced to forbear securing payment of his note by an attachant of said property, as he might and would have done but for said false representation." The court say: "Under the law as laid down by this court, the facts stated in these counts do not show a legal cause of action, or that the plaintiff has suffered any legal damage. There is no attachment or attempt to attach, on the part of the plaintiff, alleged; it does not appear that by reason of the alleged representation he lost anything which he ever had. Taking these counts in the most favorable sense for the plaintiff, they simply charge that the plaintiff, induced by the falsehood alleged, refrained from carrying into effect an intention to attach; and that another creditor did attach and apply the company's property to the payment of his debt. It must necessarily be uncertain whether the plaintiff would have attached the property and applied it to the payment of his debt if the alleged representation had not been made."

It seemed to the author of this work that this case was erroneously decided. The law recognizes the value of the preference which one creditor by diligence may obtain by a first attachment of the property of an insolvent debtor. Its practical

for a lawful trade, and then set up an illicit still there; that by falsely pretending, and by divers false and fraudulent means and devices, they made it appear and be believed that it was [53] the plaintiff who set up such still and was the proprietor thereof; that thereby he was convicted of keeping illicit stills. It was held that the damage was not the natural and proximate consequence of the defendant's act.<sup>1</sup> Where a trespassing horse kicked a child, it was held that the injury was not the natural consequence of the trespass in the absence of evidence that the defendant knew that the horse was vicious. The court said to entitle the plaintiff to maintain an action it is necessary to show a breach of some legal duty due from the defendant to the plaintiff. And if there was negligence on the part of the owner of the horse in permitting him to be at large, it did not appear to be connected with the damage of which the plaintiff complains. "The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind the owner is, of course, responsible. [54] But if the horse does something which is quite contrary to his ordinary nature, something which his owner had no reason to expect him to do, he has the same sort of protection that the owner of a dog has, and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. It was assumed that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done; therefore the plaintiff was bound to show, and did not, that the defendant knew that

value was illustrated by that case. The debtor was liable to attachment, and had property. The plaintiff alleged that he might and would have attached it but for the fraudulent representations. The court, on demurrer, held it "necessarily uncertain" that this purpose would be executed; and so much so, that the law will not accept the allegation as stating a provable fact, and it is therefore not admitted by a demurrer. It certainly cannot be maintained, as a matter

of law, that no damages can be recovered on the basis of frustrating an intention, the carrying out of which, in the future, is lawful, and would secure an advantage or prevent a loss. That it may be proved that an intention will be carried out where the party has the ability, and his interest requires it to be executed, is legally assumed in a multitude of cases.

<sup>1</sup> Barber v. Lesiter, 7 C. B. (N. S.) 175.

the horse was subject to that infirmity of temper.”<sup>1</sup> In a subsequent case a mare strayed into the plaintiff’s pasture and there, from some unexplained cause, kicked the plaintiff’s horse and broke his leg, and he was necessarily killed. Erle, C. J.: “The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question, because the act, which upon the evidence must be presumed to have caused the injury, was not one which was characteristic of vice or ferocity in the mare in the ordinary sense. The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. That constitutes the difference between this case and those relied on by the defendant, and supports the summing up of the judge when he said it was not a question of vice or *scienter* in the ordinary sense.” The de-

Expenses incurred by one whose property has been wrongfully levied on in trying to find buyers for it are too remote. *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. Rep. 324.

<sup>1</sup> *Cox v. Burbridge*, 13 C. B. (N. S.) 430; *Jackson v. Smithson*, 15 M. & W. 563; *Hudson v. Roberts*, 6 Ex. 697.

In *Dickson v. McCoy*, 39 N. Y. 400, a child of ten years was passing defendant’s stable upon the sidewalk of a populous street, when the defendant’s horse came out of the stable, being loose and unattended, and, in passing, kicked the boy. The complaint alleged that the horse was of a malicious and mischievous disposition, and accustomed to attack and injure mankind, but of this no proof was made. It was held that this was not material, that “it is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner’s negligence. The vice of

the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault,” as, for instance, in the case of a horse, properly fastened in the highway, which should kick or bite a passer-by. In such a case the owner would be liable only if he had knowledge of the vicious disposition of the animal, but where a horse is allowed to run in the streets of a populous city it is obviously dangerous to the public, and the danger is none the less because the running and kicking of the horse are done in a playful mood, than if prompted by a vicious disposition. *Mills v. Bunke*, 59 App. Div. 39, 69 N. Y. Supp. 96.

In the absence of the owner of land his wife directed her child to drive off a horse trespassing thereon; while doing so the horse kicked the child. The court distinguished *Cox v. Burbridge*, *supra*, and sustained a recovery. *Waugh v. Montgomery*, 8 Vict. L. R. (law) 290.

feudant was held responsible for the mare's trespass, the damage not being remote.<sup>1</sup>

Upon the trial of an action for the enticement of servants from the employment of another, it was held erroneous to permit evidence of consequential damages to the effect that the servants plaintiff first employed had provisions and those he subsequently employed to take their places had not, by which he was compelled to furnish provisions, and, making a poor crop, such persons were unable to pay him for the provisions furnished out of their share of the crop, by which he was damaged.<sup>2</sup>

[55] § 32. **Breach of statutory duties.** Whenever an action is brought for breach of duty imposed by statute the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another and the advantage to be derived to the party complaining of its breach from its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action. A private person might make a profit by the performance of the duty, but the breach of that duty, while it would naturally deprive him of that benefit, is not a wrong to him. The loss of such a benefit is not in a legal sense an injury. Though actual, it is not a legal consequence of the delinquency. Thus, a postmaster bound by an act of congress to advertise uncalled-for

<sup>1</sup> Lee v. Riley, 18 C. B. (N. S.) 722; Barnes v. Chapin, 4 Allen, 444, 81 Am. Dec. 710; Dunckle v. Kocker, 11 Barb. 387; Lyons v. Merrick, 105 Mass. 71.

<sup>2</sup> Salter v. Howard, 43 Ga. 601.

Under a statute which makes the person who contracts with, decoys or entices away any person in the employ of another who was entitled to the services of the person enticed liable for all such damages as the original employer may reasonably sustain by the loss of the labor of such employee, it is competent to consider the reasonable cost of pro-

curing other labor, the damages resulting to crops from delay in planting, or, if planted, from failure to work them, and such kindred damages as plaintiff could not have prevented by reasonable diligence and which are attributable to the defendant's act. McCutchin v. Taylor, 11 Lea, 259.

The damages which may be recovered for enticing away the servant of another include the profits of the servant's labor, and the loss sustained by the plaintiff's inability to improve his property in consequence. Smith v. Goodman, 75 Ga. 198.

letters in a newspaper of a particular description commits no legal wrong to the proprietor of such a paper when he omits such publication or gives the business to a paper of a different description.<sup>1</sup> If the non-performance of a duty results in injury to a third person the delinquent party is responsible to him. Thus, where the owner of a water channel or cut, made pursuant to authority of the state and open for the use of all vessels whose owners complied with the prescribed conditions, refused to allow to a tug, necessarily employed to tow a vessel through it, access to the vessel, he was responsible to her owner for damage resulting from the discharge of her cargo by lighters.<sup>2</sup> It is the natural result of locating a pest-house within a forbidden distance of a residence that the disease affecting patients in the pest-house will be communicated to persons living or visiting in the neighborhood.<sup>3</sup> "Whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action; and it is sufficient to allege the violation of the law as the basis of the right to recover, and as constituting the negligence complained of."<sup>4</sup> One who violates a statute by carrying a revolver is liable to any person injured by him therewith, though such person consented to the other's carrying and use of the revolver.<sup>5</sup> The defendant while violently beating a horse slipped and unintentionally injured the plaintiff. Because the beating was contrary to a statute forbidding cruelty to animals, there was liability to the plaintiff.<sup>6</sup>

**§ 33. Injury through third person.** Where the plaintiff is injured by the defendant's conduct to a third person it is too remote, if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or incli-

<sup>1</sup> Strong v. Campbell, 11 Barb. 145 (Ky.). See McKay v. Henderson, 71 S. W. Rep. 625 (Ky.).

<sup>2</sup> Buffalo Bayou Ship Canal Co. v. Milby, 63 Tex. 492, 51 Am. Rep. 668. <sup>4</sup> Messenger v. Pate, 42 Iowa, 443. See § 4.

<sup>3</sup> Henderson v. O'Halaran, — Ky. <sup>5</sup> Evans v. Waite, 83 Wis. 286, 53 N. W. Rep. 445.

<sup>6</sup> Osborne v. Van Dyke, 113 Iowa, 557, 85 N. W. Rep. 784, 54 L. R. A. 367.

nation of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is wilful for that purpose.<sup>1</sup> A., who had agreed with a town to support for a specific time and for a fixed sum all the town paupers, in sickness and in health, was held to have no cause of action against S. for assaulting and beating one of the paupers, whereby A. was put to increased expense. The damage was too remote and indirect.<sup>2</sup> A stockholder in a bank cannot maintain an action against its directors for their negligence in so conducting its affairs that its whole capital stock is lost and the shares therein rendered worthless, nor for the malfeasance of the directors in delegating the whole control of the affairs of the bank to the president and cashier, who wasted and lost the whole capital.<sup>3</sup> The [56] direct injury is to the corporation, and only remotely to the stockholders. The latter have a remedy, in theory, though often inadequate, in the power of the corporation as such to obtain redress for injuries done to the common property by the recovery of damages.<sup>4</sup> A party who by contract was, he furnishing the raw material, to have all the articles to be manufactured by an incorporated company, was held not entitled to maintain an action against a wrong-doer who by trespass stopped the company's machinery so that it was prevented from furnishing, under that contract, manufactured goods to so great an extent as it otherwise would have done.<sup>5</sup> A creditor can maintain no action against one who has forged a note by which the dividends from an estate were diminished.<sup>6</sup> An insurance company cannot recover from a wrong-doer who causes the loss insured against the money paid to satisfy such loss.<sup>7</sup> A man drafted into the military service deserted, and

<sup>1</sup> *Brink v. Wabash R. Co.*, 160 Mo. 87, 60 S. W. Rep. 1058, 83 Am. St. 459; *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278; *Lumley v. Gye*, 2 El. & Bl. 216; *McKay v. Henderson*, 71 S. W. Rep. 625 (Ky.).

<sup>2</sup> *Anthony v. Slaid*, 11 Met. 290.

<sup>3</sup> *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690. See *Bloom v. National United Benefit Savings & L. Co.*, 152 N. Y. 114, 46 N. E. Rep. 166.

<sup>4</sup> *Id.*

<sup>5</sup> *Dale v. Grant*, 34 N. J. L. 142.

<sup>6</sup> *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140.

<sup>7</sup> *Rockingham Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Connecticut, etc. Ins. Co. v. New York, etc. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571. See *Pacific Pine Lumber Co. v. Western U. Tel. Co.*, 123 Cal. 428, 56 Pac. Rep. 103.

another who had been drawn as an alternate to serve in such a contingency, and was consequently obliged to and did serve, was held to have no legal claim against the deserter for the loss and injury of doing so.<sup>1</sup> But where a tradesman or mechanic is defamed in his business or avocation by a false and fraudulent device practiced upon one of his customers, the person who is guilty of such fraud is responsible for a loss of patronage flowing therefrom, although the customer was also wronged.<sup>2</sup> The exception indicated in the opening sentence of the section is illustrated by a case in which the defendant falsely claimed and represented himself to be a superintendent of wharves and harbor-master, and as such to have issued an order directing the captain of a vessel moored at the plaintiff's wharf to remove therefrom. At the time the order was given the captain was discharging, and the plaintiff was receiving, a cargo from the vessel. The plaintiff owned and kept such wharf for the purpose of letting it for hire. By means of such acts the captain was induced to remove from the plaintiff's wharf and discharge his cargo at another wharf. The right to recover was adjudged if the defendant acted with a malicious and fraudulent design to injure the plaintiff.<sup>3</sup>

**§ 34. Liability as affected by extraordinary circumstances.**

There must not only be a legal connection between the injury and the act complained of, but such nearness in the order of events and closeness in the relation of cause and effect that the influence of the injurious act may predominate over that of other causes, and concur to produce the consequence or be traced to those causes.<sup>4</sup> To a sound judgment must be left each particular case. The connection is usually, but not always, enfeebled and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, or where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. The requirement that the consequences to be answered for should be natural and proximate is not that they should [57]

<sup>1</sup> *Jemison v. Gray*, 29 Iowa, 537.

<sup>3</sup> *Gregory v. Brooks*, 35 Conn. 437.

<sup>2</sup> *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

95 Am. Dec. 278.

<sup>4</sup> *Coyle v. Baum*, 3 Okla. 695, 716, 41 Pac. Rep. 389, quoting the text.

be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence would anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of such an extraordinary result as that the usual course of nature should seem to have been departed from.<sup>1</sup> The general rule is that a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.<sup>2</sup> We are not to link together as cause and effect events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it unless the other event was the effect of our act, or was within the probable range of ordinary circumspection. If one's fault happens to concur with something extraordinary and therefore not likely to be foreseen he will not be answerable for such unexpected result.<sup>3</sup>

**§ 35. Illustrations of the doctrine of the preceding section.** An injury by negligence was done to wool by wetting it, rendering it necessary to take it out of the original packages

<sup>1</sup> *Harrison v. Berkley*, 1 Strobh. 525, 549, 47 Am. Dec. 578. This case is criticised in a note on p. 830, 36 Am. St., which criticism is approved in *Meyer v. King*, 72 Miss. 1, 12, 16 So. Rep. 245, 35 L. R. A. 474.

<sup>2</sup> *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532; *Crain v. Petrie*, 6 Hill, 523, 41 Am. Dec. 765; *McGrew v. Stone*, 53 Pa. 436; *Big Goose & Beaver Ditch Co. v. Morrow*, 8 Wyo. 537, 547, 59 Pac. Rep. 159, 80 Am. St. 955, citing the text.

<sup>3</sup> *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. Rep. 1, 41 L. R. A. 794; *Meyer v. King*, 72 Miss. 1, 8, 16 So. Rep. 245, 35 L. R. A. 474, citing the text; *Roach v. Kelly*, 194 Pa. 24, 44 Atl. Rep. 1090, 75 Am. St. 685; *Mc-*

*Grew v. Stone*, *supra*; *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *People v. Mayor*, 5 Lans. 524; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. 379, 85 N. W. Rep. 618; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. Rep. 335, 80 Am. St. 577; *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279, 286, 72 N. W. Rep. 735; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 475; *Consolidated Electric Light & P. Co. v. Koepp*, 64 Kan. 735, 67 Pac. Rep. 608.

Some of the cases which deny the right to recover for mental suffering or nervous shock do so on the ground that the injury is too remote. See § 21 *et seq.*



in which it had been imported. A few weeks afterwards an act of congress was passed under which, if the wool had remained in the original packages, the plaintiff would have been entitled to a return of duties. It was held that the loss of the right to claim a return thereof was not recoverable as a proximate consequence of the negligence. It was remarked that if the market value of the wool in the original packages had been higher by reason of its being entitled to debenture under the laws existing at the time when the injury was done, the plaintiff would have had a right to an increase of damages in consequence of being obliged to break the packages; so if the market value had been enhanced at that time by reason of a general expectation that an act of congress would be passed allowing a return of duties.<sup>1</sup> In trespass for taking two horses, a wagon and double harness, the declaration stated as special damage occasioned thereby that when it occurred the plaintiff was moving with his family and household goods to another state, and was employing his horses, wagon and harness for that purpose; that he was thereby prevented from pursuing his journey, and put to great expense for the support of himself and family; that when the property was taken the roads were frozen and the traveling good; but while it was detained the frost left the ground and the roads became so muddy that it was quite impossible for the plaintiff to prosecute his journey, by reason whereof he was detained with his family and prevented from putting in his crops in the state to which he was moving. It was held erroneous to admit evidence of these various circumstances. The court recognized the rule that to be recovered the damages must be the natural and proximate consequence of the act complained of; but it was said "no case can be found where a mere accident or event not resulting naturally from the act done by the defendant has been held sufficient to constitute a valid claim for damages."<sup>2</sup> The law is correctly stated, but in other cases there has been recovery for some of the damages here denied. In the plaintiff's

<sup>1</sup> Stone v. Codman, 15 Pick. 297.

<sup>2</sup> Vedder v. Hildreth, 2 Wis. 427.

If the owner of horses illegally seized is unable to procure other means to cultivate his crop, and in

consequence it is damaged in excess of the value of the horses, he may recover for the injury to the crop. Steel v. Metcalf, 4 Tex. Civ. App. 313, 23 S. W. Rep. 474.

predicament increased expenses and loss of time were necessary results of the taking of the property. In an English case<sup>1</sup> the plaintiff took passage to Australia in the defendant's vessel, but he was not allowed to sail on account of a mistaken belief that he had not paid his entire fare. The error was found out immediately and he was offered a passage in a ship which sailed in a week after the first. Instead of going by it, however, he remained in England to a later time to sue the defendant. It was held that the expense of his keep till trial could not be allowed as damages, since he might have gone earlier if he had wished. The suicide of one who was injured on a railway train eight months after the injuries were sustained, though they disordered his mind and body, is not a result which might naturally and reasonably be expected to follow. The court say: "The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood' in which the train of all causation ends."<sup>2</sup> The fact that a passenger train three-fourths of an hour behind its schedule time was blown over by a windstorm which struck a portion of the track on which the train would not have been but for the delay, does not make the company liable for an injury thereby sustained by a passenger.<sup>3</sup>

A convict, aged thirty-seven years, had been in the penitentiary twelve years, and had escaped therefrom five times. He was in vigorous health, immoral, of vicious habits, violent passions and prone to desire for sexual intercourse, all of which facts his custodians knew. While at large, through their fault, the convict committed rape. Such act, it was ruled, was not one which the custodians ought to have fore-

<sup>1</sup> Ansett v. Marshall, 22 L. J. (Q. B.) 118.

<sup>2</sup> Scheffer v. Railroad Co., 105 U. S. 249. See § 36.

If the injury which a deceased person received precipitated a malady and he would not have had it but for

the wrong done him, the jury may determine whether the injury was the proximate cause of death. Turner v. Nassau Electric R. Co., 41 App. Div. 213, 58 N. Y. Supp. 490.

<sup>3</sup> McClary v. Sioux City & P. R. Co., 3 Neb. 44, 19 Am. Rep. 631.

seen as reasonably probable, and they were not liable for it.<sup>1</sup> Because of the icy condition of a chute used for loading stock an animal thereon slipped and fell, knocking down a second, which fell upon and injured plaintiff. It was no defense that this connected series of causes produced the injury.<sup>2</sup> Though a snow storm causes animals to travel toward and into a dangerous excavation, the existence of the latter and the neglect of the person responsible therefor are the proximate cause of the loss of the animals.<sup>3</sup> Making an assault on a woman waiting in a railroad station at night in consequence of which her child of seven years becomes frightened, runs out on the tracks, and is killed by a train, is the proximate cause of the death.<sup>4</sup> While standing on a platform waiting for a train, the plaintiff was injured by being struck by the dead body of a person who was killed while attempting to cross the tracks of the railroad near where the plaintiff was. Assuming that negligence on the part of the railroad company was shown, there was no liability.<sup>5</sup> The Georgia court reached a different conclusion where the company's engineer acted recklessly and wantonly.<sup>6</sup>

**§ 36. Liability of carriers for consequential damages; extraordinary circumstances.** The recent leading American case on the liability of carriers of passengers for consequential damages was decided in 1882.<sup>7</sup> Although the decision was not unanimous it has had a noticeable influence in courts which have since been called upon to consider similar questions. The principal facts involved are not essentially different from those in an English case decided in 1875;<sup>8</sup> but the rules of law applied are in strong contrast. This is in part accounted for by the fact that in the Wisconsin case the action

<sup>1</sup> Henderson v. Dade Coal Co., 100 Ga. 568, 28 S. E. Rep. 251, 40 L. R. A. 95; Hullinger v. Worrell, 83 Ill. 220.

<sup>2</sup> Kincaid v. Kansas City, etc. R. Co., 62 Mo. App. 365.

<sup>3</sup> Big Goose & Beaver Ditch Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. 955.

<sup>4</sup> McGehee v. McCarley, 33 C. C. A. 29, 91 Fed. Rep. 462.

<sup>5</sup> Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 Atl. Rep. 699, 35 L. R. A. 199, 55 Am. St. 728, followed in Evansville, etc. R. Co. v. Welch, 25 Ind. App. 308, 58 N. E. Rep. 88.

<sup>6</sup> Western & R. Co. v. Bailey, 105 Ga. 100, 31 S. E. Rep. 547.

<sup>7</sup> Brown v. Chicago, etc. R. Co., 54 Wis. 342, 11 N. W. Rep. 356, 911.

<sup>8</sup> Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111.

was held to be in tort, while the English case was considered as one for breach of the contract. In the former the plaintiffs were husband and wife. They had been the defendant's passengers, and were directed to leave its train at a point three miles from M., their destination, being told that that place was reached. When they disembarked it was dark; a freight train stood on a side-track; there were no lights visible, and no platform on which to alight. There was a station-house near, but it was hid from their view by the freight train. The plaintiffs did not know their location, but supposed that they were one mile nearer M. than they were; they started thither expecting to find a house in which they might remain, but did not find one until they were within one mile of M., when they concluded to go on rather than to seek shelter at the house, it being a considerable distance from the track. It was late at night when they reached M. and Mrs. B. was quite exhausted. She was pregnant at the time, and during that night suffered severe pains which continued for more than two months, when a miscarriage resulted and inflammation set in. The jury found that her sickness was caused by the walk, that the plaintiffs were not negligent in taking that walk, but were compelled to take it as the result of the defendant's wrongful act. The first question determined was that the action was in tort for the negligence and not upon the contract to carry, notwithstanding the complaint recited that the relation between the parties was a contract relation, and that the defendant "wholly disregarded its duty in the premises, and its contract and obligations to and with the plaintiffs."<sup>1</sup> The court,

<sup>1</sup> This view of the nature of the action is different from that entertained in *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111 (compare *McMahon v. Field*, 7 Q. B. Div. 591), where it was held that an action resting on facts which are quite like those in the principal case was upon contract, and that damages resulting from the walk taken by the plaintiff to reach his home and sickness consequent thereupon could not be recovered. The case referred to is disapproved in *Evans v. St. Louis, etc. R. Co.*, 11

Mo. App. 463, 472; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

The rule declared in the Wisconsin case as to the form of the action is in harmony with *Sloane v. Southern California R. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320; *Head v. Georgia, etc. R. Co.*, 79 Ga. 538, 11 Am. St. 454, 7 S. E. Rep. 217; *Seals v. Augusta Southern R. Co.*, 102 Ga. 817, 29 S. E. Rep. 116; *Carsten v. Northern Pacific R. Co.*, 44 Minn. 454, 20 Am. St. 589, 47 N. W. Rep. 49, 9 L. R. A.

Taylor, J., writing the opinion, said that the doctrine is clearly established that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly therefrom, whether such damages might have been foreseen by the wrong-doer or not. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and on account of the state of health of the parties, in their attempts to find shelter, they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. Its wrongful act would be the natural and direct cause of their deaths, and it would be a lame excuse for the defendant that if the plaintiffs had been of more robust health they would not have perished or have suffered any material injury. It was no excuse that the female plaintiff's condition was not known to the railroad employees.<sup>1</sup> By wrongfully placing the parties in the position in which they were the defendant was also liable for the resulting injury, whether it was the immediate result of its act or of theirs in endeavoring to escape therefrom. The case was within the rule that where an efficient adequate cause is found it must be considered the true cause unless some other cause independent of it is shown to have intervened between it and the result.<sup>2</sup> In strong contrast with

688; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. Rep. 17, 36 L. R. A. 535; *Chicago, etc. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. Rep. 926; *L. & N. R. Co. v. Storms*, 15 Ky. L. Rep. 333 (Ky. Super. Ct.); *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160, 13 So. Rep. 246; *Toronto R. Co. v. Grinsted*, 24 Can. Sup. Ct. 570.

<sup>1</sup> *Sloane v. Southern California R. Co.*, *supra*; *Mann v. Boudoir Car Co.*, 4 C. C. A. 540, 54 Fed. Rep. 646, 21 L. R. A. 289; *East Tennessee, etc. R. Co. v. Lockhart*, 79 Ala. 315.

<sup>2</sup> *Brown v. R. Co.*, *supra*, has been approved, as to the substantial point in it, in *Sloane v. R. Co.*; *Coy v. Gas Co.*; *Chicago, etc. R. Co. v. Spirk*, *supra*; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168;

*Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 43 Am. Rep. 179. To the same effect are *Winkler v. St. Louis, etc. R. Co.*, 21 Mo. App. 99; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. Rep. 764; *Evans v. St. Louis, etc. R. Co.*, 11 Mo. App. 463; *Fitzpatrick v. Great Western R. Co.*, 12 Up. Can. Q. B. 645; *Baltimore City P. R. v. Kemp*, 61 Md. 74; *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764; *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622; *Toronto R. Co. v. Grinsted*, 24 Can. Sup. Ct. 570; *Yazoo, etc. R. Co. v. Aden*, 77 Miss. 382, 27 So. Rep. 385. See *Smith v. British, etc. Co.*, 86 N. Y. 408; *Putnam v. New York, etc. R. Co.*, 47 Hun, 439; §§ 48. 49.

An agent who wrongfully informs a

the case stated is one decided in 1873,<sup>1</sup> in which it is held that a female passenger who suffers injuries through a carrier's negligence cannot recover for such as are the result of the physical condition she is in, as where illness follows arrested menstruation, although the negligence produces that condition. It is well observed concerning this case that it is unsustained by authority and is supported by neither the principles of law nor humanity.<sup>2</sup> If a passenger wrongfully put off a train at a flag-station, when it is dark and a storm is raging, and at a great distance from his starting point and destination, is injured by falling through a cattle-guard while on his way to the nearest station, the jury may decide whether the result is attributable to such wrong.<sup>3</sup>

If a shock or injury to the nervous system is occasioned by the wrongful ejection of a passenger from a car it will be regarded as a physical injury, and the act which caused the shock will be taken to be the proximate cause of the injury if bodily suffering is the result of the shock.<sup>4</sup> If a passenger who informs a conductor when she boards his train that friends will meet her at her destination is carried beyond it and obliged to sit up all night in a car into which cold is admitted, and to change cars during the night and leave the train at an early hour in the morning, the jury may well find that the carrier is responsible for her subsequent sickness.<sup>5</sup> One who has bought a ticket and is waiting in a station to take a train is a passenger,<sup>6</sup> and if the carrier's gateman, knowing that such

passenger that a train she is about to take will make close connections with the train of another road at a designated place is not bound to foresee that she would procure a conveyance, and, in the face of a storm, in a delicate state of health, drive over a rough road to her father's house, and that a miscarriage would result. *Fowlkes v. Southern R. Co.*, 96 Va. 742, 32 S. E. Rep. 464.

<sup>1</sup> *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89.

<sup>2</sup> *Brown v. Chicago, etc. R. Co.*, *Terre Haute & I. R. Co. v. Buck*, *Ehr Gott v. Mayor*, *supra*.

<sup>3</sup> *Evans v. St. Louis, etc. R. Co.*, 11 Mo. App. 463; *Winkler v. Same*, 21 id. 99. See *Patten v. Chicago & N. R. Co.*, 32 Wis. 524; and compare *Lewis v. Flint, etc. R. Co.*, 54 Mich. 55, 19 N. W. Rep. 744.

<sup>4</sup> *Sloane v. California Southern R. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320.

<sup>5</sup> *Missouri, etc. R. Co. v. Hennesey*, 20 Tex. Civ. App. 316, 49 S. W. Rep. 917; *Grimsted v. Toronto R. Co.*, 21 Ont. App. 578.

<sup>6</sup> *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72; *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Wells v. New*

person is ill, is so waiting, and has bought his ticket, fails to comply with his request to notify him of the arrival of his train, and after the train has gone directs a policeman to eject such person from the station, saying that "he was not in a condition of mind to go on any train," and such person, after being ejected, and while wandering about the tracks near the station, is run over by a train and killed, the carrier is responsible.<sup>1</sup> If the agent of an express company receives a package for transportation with notice that it contains medicine for a sick person, and that it is important that it be sent at once, the carrier is liable for the physical and mental injury which its delay in forwarding the medicine may occasion to the sick person; but not for the mental suffering of the husband on account of his wife's condition.<sup>2</sup> Where a carrier had left a locked car marked "powder" near its warehouse, in which a fire broke out, and the city fire department refrained from making efforts to put out the fire through reasonable fear of the explosion of the powder supposed to be in the car, notwithstanding the car was empty, the negligence in so leaving the car is the proximate cause of the loss of property in the warehouse, it being reasonably certain that the fire would have been controlled but for the apprehension of the firemen.<sup>3</sup> On the other hand, a carrier is not presumed to contemplate that an accident may produce insanity in one of its passengers, no bodily harm being sustained.<sup>4</sup> To recover consequential damages, resulting from being ejected from a train, the plaintiff must show that his subsequent conduct in attempting to reach his destination was reasonable.<sup>5</sup> The failure to stop a train at a proper place does not justify a passenger in leaping off, unless he is invited to do so by the carrier's agent and the attempt was not obviously dangerous.<sup>6</sup> In the absence of notice that a passenger whom a conductor has promised to awaken was to be met at a sta-

York Central, etc. R. Co., 25 App. Div. 365, 49 N. Y. Supp. 510.

<sup>1</sup> Wells v. R. Co., *supra*.

<sup>2</sup> Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363, 27 S. W. Rep. 830.

<sup>3</sup> Hardman v. Montana Union R. Co., 27 C. C. A. 407, 83 Fed. Rep. 88.

<sup>4</sup> Haile v. Texas & Pacific R. Co., 9 C. C. A. 134, 60 Fed. Rep. 557, 23

L. R. A. 774; Scheffer v. Railroad Co., 105 U. S. 249; St. Louis, etc. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. 206, 64 S. W. Rep. 226.

<sup>5</sup> Chicago, etc. R. Co. v. Spirk, 51 Neb. 167, 70 N. W. Rep. 926.

<sup>6</sup> Burgin v. Richmond & D. R. Co., 115 N. C. 673, 20 S. E. Rep. 473.

tion on another road by her father and carried thence to her sister's, where her sick child would receive medical treatment, there is no liability for her mental suffering caused by failure to meet her father and anxiety respecting the child though the conductor failed to keep his promise.<sup>1</sup>

If the negligence of a carrier results in an injury to a passenger by which his system is rendered susceptible to disease and less able to resist it when he is attacked by it, and death results, the injury is the proximate cause thereof, although the disease is to be regarded as an intervening agency, and the malady which attacked him was prevalent in the community.<sup>2</sup> The court observe that if it "were to undertake to declare any other rule we should be involved in inextricable confusion, for it is clear that the passenger who suffers injuries of a serious character is entitled to some damages, and it is impossible for any one to pronounce, as a matter of law, at what point the injury flowing from the wrong terminated. The only possible practicable rule is that the wrong-doer whose act is the mediate cause of the injury shall be held liable for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury."<sup>3</sup>

[59] § 37. **Intervening cause.** Goods carried in a canal boat were injured by the wrecking of the boat, caused by an extraordinary flood which would not have been encountered

<sup>1</sup> Chicago, etc. R. Co. v. Boyles, 11 Tex. Civ. App. 522, 33 S. W. Rep. 247. This case is of doubtful authority. Compare it with Missouri, etc. R. Co. v. Hennessey, 20 Tex. Civ. App. 316, 49 S. W. Rep. 917.

<sup>2</sup> McCoy v. Indianapolis Gas Co., 146 Ind. 655, 667, 46 N. E. Rep. 17, 36 L. R. A. 535, quoting the text.

<sup>3</sup> Bradshaw v. Lancashire, etc. R. Co., L. R. 10 C. P. 109; Baltimore Passenger R. Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134; Oliver v. La Valle, 36 Wis. 592; Sloan v. Edwards, 61 Md. 89; Delie v. Chicago, etc. R. Co., 51 Wis. 400, 8 N. W. Rep. 265; Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. Rep. 65; Baltimore & P. R. Co. v.

Reaney, 42 Md. 117; Lyons v. Second Avenue R. Co., 89 Hun, 374, 35 N. Y. Supp. 372, affirmed without opinion, 115 N. Y. 654; Purcell v. Lauer, 14 App. Div. 33, 43 N. Y. Supp. 988; Keegan v. Minneapolis, etc. R. Co., 76 Minn. 90, 78 N. W. Rep. 965; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168. The opinion in the last case reviews a large number of cases, including Ginna v. Second Avenue R. Co., 8 Hun, 494, affirmed 67 N. Y. 596; Brown v. Chicago, etc. R. Co., 54 Wis. 342, 11 N. W. Rep. 356, 911; Sauter v. New York, etc. R. Co., 66 N. Y. 50, 23 Am. Rep. 18. Compare Scheffer v. Railroad Co., 105 U. S. 249, and other cases cited in n. 4, p. 109.



but for a retarded passage in consequence of the carrier employing a lame horse. This fact was so unlikely to conduce to such an event that the defendant was not liable.<sup>1</sup> A carrier was guilty of a negligent delay of six days in transporting wool which, while in his depot at the place of destination a few days after, was submerged by a sudden and violent flood. The flood was the proximate cause of the injury and the delay the remote cause.<sup>2</sup> The same rule has been applied where there was negligent delay in dispatching goods and they were lost while in the carrier's hands by flood, sudden storm or other immediate cause; the damage occurring without his fault, he was not responsible.<sup>3</sup> In similar cases in New York and other states a different conclusion has been reached. In one it was held that when a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show that he was himself free from fault. His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.<sup>4</sup> There was unreasonable delay on the part of the carrier in forwarding goods, and while they were in a railroad depot at an intermediate point they were injured by an extraordinary flood; the carrier was liable because the goods were exposed to the flood by his fault.<sup>5</sup> These cases re-

<sup>1</sup> *Morrison v. Davis*, 20 Pa. 171; *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

<sup>2</sup> *Denny v. New York Central R. Co.*, 13 Gray, 481, 74 Am. Dec. 645.

<sup>3</sup> *Railroad Co. v. Reeves*, 10 Wall. 166; *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106.

<sup>4</sup> See *McAlister v. Chicago, etc. R. Co.*, 74 Mo. 351, 4 Am. & Eng. R. Cas. 210.

<sup>5</sup> *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Wald v. Pittsburg, etc. R. Co.*, 162 Ill. 545, 44 N. E. Rep. 888, 53 Am. St. 332, 35 L. R. A. 356, citing *McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696; *Dening v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Read v. St. Louis, etc. R. Co.*, 60 Mo. 199; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Davis v. Garrett*, 6 Bing. 617; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Rodgers v. Central*

lating to carriers or others held to an absolute responsibility, [60] except as relieved by showing that the injury was caused by the act of God, are not wholly controlled by the consideration of the nearness of the injury to the fault. Davies, J., said: "It is to be observed that the foundation of this exemption is that the party claiming the benefit and application of it must be without fault on his part." He refers to several cases.<sup>1</sup> "These cases," he continues, "clearly establish the rule that the carrier cannot avail himself of the exception to his liability which the law has created, unless he has been free from negligence or fault himself. The policy of the law is to hold him to a strict liability; and this policy, for wise and just purposes, ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, from such an event the [61] law excuses him, but it only does it when he himself is not in fault and is free from all negligence."<sup>2</sup> It has been held

Pacific R. Co., 67 Cal. 606, 8 Pac. Rep. 377; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Philadelphia & R. R. Co. v. Anderson, 94 Pa. 360.

<sup>1</sup> Davis v. Garrett, 6 Bing. 716. In this case the plaintiff put on board the defendant's barge lime to be conveyed from M. to L. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge thereby taking fire the whole was lost, and he was held liable. Tindal, C. J., observed that no wrong-doer can be allowed to apportion or qualify his own wrong, and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to such act, he could not set up as an answer to the action the bare possibility of a loss if the act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it must have happened, if the act complained of had

not been done. Charleston Steamboat Co. v. Bason, 1 Harp. 262; Campbell v. Morse, id. 468; Bell v. Reed, 4 Bin. 127, 5 Am. Dec. 398; Hart v. Allen, 2 Watts, 114; Hand v. Baynes, 4 Whart. 204; Williams v. Grant, Crosby v. Fitch, *supra*.

<sup>2</sup> In Read v. Spaulding, 30 N. Y. 630, 639, 86 Am. Dec. 426.

See last section. In Parmalee v. Wilks, 22 Barb. 539, the plaintiff, the owner of a raft of saw logs lying at Port Maitland, Canada, made a contract with the defendants, the owners of a steamboat, by which it was agreed that they would come to Port Maitland on the next Tuesday morning with the steamboat, and proceed up the river about five miles to D., and there land her passengers, and immediately return to Port Maitland and take the plaintiff's raft in tow, and tow it to Black Rock, a distance of about forty miles, which the steamboat could traverse in about fourteen hours with the raft in tow. The usual time for the arrival of the steamboat at Port Maitland, upon her

that if an administrator deposits money of an estate in a bank and allows it to remain after the time when it should, by punctual performance of his duty, have been distributed and in the hands of those entitled to it, and the bank fails and the money is lost, he and his sureties are liable therefor, and the sum so lost is the measure of damages.<sup>1</sup>

It is immaterial what is the intermediate cause between the act complained of and the injurious consequence, if such act is the efficient and proximate cause, and the consequence was the probable result. There may be intervening operations of nature, acts produced by the volition of animals or of human beings, innocent acts of the injured party or of third persons, and even tortious acts of the latter, and the chain of cause and effect not be necessarily broken, or the result rendered remote. The test is not to be found in any arbitrary number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the

trip up, was 3 o'clock in the morning, and it generally took about two hours to proceed to D., land her passengers and return to Port Maitland. On Tuesday morning the weather was fair, and the lake and river were calm, and so continued through the day. But the boat failed to call for the raft according to the agreement. In the evening, about sunset, she returned, and took the raft in tow for Black Rock. During the night a storm arose, and the raft went to pieces and was scattered along the shore. Held, that had the defendants entered upon the performance of the contract at the time specified, and used proper diligence in attempting to perform it, the plaintiff would have taken all the risk of storms or other casualties. But as they delayed for some fourteen hours to enter upon its performance, and as such delay resulted in the raft being overtaken by the storm, they were responsible for the consequences; that when they took the raft in tow in the *evening* instead

of the *morning*, as agreed, they took the risk of any storm that should arise after a sufficient time had elapsed for towing the raft to Black Rock, if they had commenced the towing in the morning. The plaintiff had a right to fix the time in the contract, and make it an essential part of it, considering the dangers of navigation upon the lake, and the peculiar nature and condition of his property; he might determine when the voyage should commence, and make a special agreement to that effect. And upon the non-performance of the agreement, at the time specified, the party in default was liable for the damages resulting from causes which would not have arisen had the agreement been performed. *Michaels v. New York Central R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394.

<sup>1</sup> *McNabb v. Wixom*, 7 Nev. 163.

injury.<sup>1</sup> In entering a slip a ferryboat, through negligence, struck the side of the rack with such violence as to cause the passengers to sway, in consequence of which one of their number fell and was injured. The producing cause was negligence, and there was no interruption thereof by what the injured person did after his fall.<sup>2</sup> One who builds a back fire to save his property from a fire negligently caused by another does only what he ought to do, and if the fire he started ruins the property it was designed to save there is no break in the chain of cause and effect as to the wrong-doer, if it is clear that the property would have been burned, had the second fire not been set.<sup>3</sup> Allowing a long ladder to rest outside a sidewalk in a village street and against a building was the proximate cause of an injury sustained by a passer-by through its fall in consequence of an unusual wind.<sup>4</sup>

[62] § 38. **Same subject.** The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole; or was there some new and independent cause, disconnected from the primary fault and self-operating, which produced the injury? The inquiry must be answered in accordance with common understanding.<sup>5</sup> The

<sup>1</sup> McDonald v. Snelling, 14 Allen, 296; Vandenburg v. Truax, 4 Denio, 464; Kellogg v. Chicago, etc. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Murdock v. Walker, 43 Ill. App. 590; Northern Pacific R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. Rep. 658.

<sup>2</sup> Cash v. New York Central, etc. R. Co., 56 App. Div. 473, 67 N. Y. Supp. 823.

<sup>3</sup> McKenna v. Baessler, 86 Iowa, 197, 53 N. W. Rep. 103, 17 L. R. A. 310; Owen v. Cook, 9 N. D. 134, 81 N. W. Rep. 285, 47 L. R. A. 646.

<sup>4</sup> Moore v. Townsend, 76 Minn. 64,

78 N. W. Rep. 880. See Parmenter v. Marion, 113 Iowa, 297, 85 N. W. Rep. 90; Trapp v. McCiellan, 68 App. Div. 362, 74 N. Y. Supp. 130.

<sup>5</sup> Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469.

In Lowery v. Manhattan R. Co., 99 N. Y. 158, 1 N. E. Rep. 608, 52 Am. Rep. 12, 12 Daly, 431, fire fell from a locomotive on an elevated road upon a horse and its driver. The horse ran, and, resisting an attempt to get him against a curbstone, ran over it and injured the plaintiff, who was on the sidewalk. The driver's effort

act of giving or selling liquor to a man in a stupidly drunken condition, with knowledge thereof, no duress, deception or persuasion being used,<sup>1</sup> although a statutory misdemeanor, is only the remote cause of his death; his act in drinking it is the proximate and intervening cause.<sup>2</sup> The voluntary intoxication of a person who has attained the age of discretion, but for which the injury resulting from the sale of chloroform to him in violation of law would not have happened, breaks the chain of cause and effect.<sup>3</sup> The sale of poison without the label required by statute does not make the vendor liable for the death of a man who took it while intoxicated. His acts in buying and taking it were the proximate cause of his death; they were independent acts, which intervened and broke all connection

to stop the horse by turning him from the course he was taking was, whether prudent or not, a continuation of the result of the defendant's negligence, and its natural and probable consequence, as was the injury inflicted upon the plaintiff.

A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near the plaintiff's property, met a fire, having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiff's property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. Held, that the rule of liability in case of joint wrong-doers does not apply; that the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss. After

the fire swept everything of a combustible character clean on both sides of defendant's right of way, plaintiff's horses, that were running at large, went upon the railway track and were killed by a passing train without negligence on the part of the train-men. The right of way had never been fenced as required by law. Held, that the rule of absolute liability, under the statute requiring railway companies to fence their tracks, applies only where the loss is produced, in whole or in part, by reason of the failure to fence; that in the circumstances stated the chain of causation reaching from the failure to fence was broken by the fire that would unquestionably have destroyed the fence if it had existed, so that the failure to fence cannot be said to have contributed to the entry of the horses upon the railway track. *Cook v. Minneapolis, etc. R. Co.*, 98 Wis. 624, 74 N. W. Rep. 561, 40 L. R. A. 457 (as stated in the syllabus by Marshall, J.).

<sup>1</sup> See *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260.

<sup>2</sup> *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119.

<sup>3</sup> *Meyer v. King*, 72 Miss. 1, 16 So. Rep. 245, 35 L. R. A. 474.

between the omission to label and the death.<sup>1</sup> The owner of a ferryboat must foresee that horses thereon may take fright at the sound of whistles from other boats, and guard against such horses backing into the water, and if he fails to provide a sufficient rail to prevent that result his neglect is the efficient cause of the loss of the horses.<sup>2</sup> One whose private way over the land of another is obstructed by a fence built under a claim of right, and who proceeds to have such way laid out as a public way, cannot recover the expense of so doing in a suit for the obstruction of the way.<sup>3</sup> Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the instinctive or known vicious disposition or habits of animals, or any other natural cause, under circumstances which render it probable that such an injury will occur, is a primary, efficient and proximate cause if harm ensues.<sup>4</sup> Many such cases have been referred to in the preceding pages. Persons who dam water-courses are presumed to have knowledge of the fact that natural causes operate to fill up their beds and cause water to overflow adjacent lands; they cannot avoid liability for the resultant consequences because of such fact.<sup>5</sup> If a positive tort is committed by unnecessarily leaving an obstruction in the bed of a natural water-course the parties who commit the wrong must take notice of the violence of rainfalls in that locality.<sup>6</sup>

### § 39. Acts of injured party; fraud and exposure to peril.

The act of the injured party may be the more immediate cause of his injury; yet, if that be an act which was as to him reasonably induced by the prior misconduct of the defendant, and without any concurring fault of the sufferer, that misconduct will be treated as the responsible and efficient cause of the damage. Cases of fraud where, by some artifice or false representation, the plaintiff has been induced to incur obliga-

<sup>1</sup> Ronker v. St. John, 21 Ohio Ct. Ct. 39.

<sup>2</sup> Sturgis v. Kountz, 165 Pa. 358, 30 Atl. Rep. 976, 27 L. R. A. 390.

<sup>3</sup> Holmes v. Fuller, 68 Vt. 207, 34 Atl. Rep. 699.

<sup>4</sup> Western & A. R. Co. v. Bailey, 105 Ga. 100, 31 S. E. Rep. 547; Alabama, etc. R. Co. v. Chapman, 83

Ala. 453, 3 So. Rep. 813; Vogel v. McAuliffe, 18 R. I. 79, 31 Atl. Rep. 1.

<sup>5</sup> Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. Rep. 212; Elder v. Lykens Valley Coal Co., 157 Pa. 490, 27 Atl. Rep. 545, 37 Am. St. 742.

<sup>6</sup> Brink v. Kansas City, etc. R. Co., 17 Mo. App. 177, 202.

tions, part with his property, or place himself in any predicament by which he suffers loss, are apt illustrations. The act by which he binds himself, pays money or alters his situation is his own, but superinduced by the superior vicious will of the defrauding party; and the latter is responsible for all the loss which ensues. A single instance will suffice. W. obtained goods from the plaintiff on credit, upon the representation of R. that W. was responsible and worthy of credit and owed very little if anything. At the time of the sale and delivery of the goods W. was insolvent and R. knew it. R. himself had a judgment against W. for a considerable amount docketed only a month previous to the sale. On this judgment R. caused an execution to be issued and levied upon the [63] goods so obtained from the plaintiff before they reached W. It was held that for these representations R. was liable to the plaintiff for the value of the goods sold to W.<sup>1</sup>

If the plaintiff is placed in a situation of danger to person or property by the defendant's misconduct and is injured in a reasonable endeavor to extricate himself, such misconduct is the proximate cause of the injury, though it proceed more immediately, and it may be exclusively, from the plaintiff's own act. Thus, if through the default of a coach proprietor in neglecting to provide proper means of conveyance a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.<sup>2</sup> Nor is a person

<sup>1</sup> Bean v. Wells, 28 Barb. 466.

<sup>2</sup> Jones v. Royce, 1 Stark. 493; Ingalls v. Bills, 9 Met. 1; McKinney v. Neil, 1 McLean, 540; Frink v. Potter, 17 Ill. 406; Buel v. New York, etc. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; McPeak v. Missouri Pacific R. Co., 128 Mo. 617, 30 S. W. Rep. 170; Epiland v. Missouri Pacific R. Co., 57 Mo. App. 147; Southwestern R. Co. v. Paulk, 24 Ga. 356; Wilson v. Northern Pacific R. Co., 26 Minn. 278, 3 N. W. Rep. 333, 37 Am. Rep. 410; Oliver v. La Valle, 36 Wis. 592; Twomley v. Central, etc. R. Co., 69

N. Y. 158; Filer v. New York Central R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Smith v. St. Paul, etc. R. Co., 30 Minn. 169, 14 N. W. Rep. 797; Dimmitt v. Hannibal, etc. R. Co., 40 Mo. App. 654; Knowlton v. Milwaukee City R. Co., 59 Wis. 278, 18 N. W. Rep. 17; Knapp v. Sioux City & P. R. Co., 65 Iowa, 91, 21 N. W. Rep. 198, 54 Am. Rep. 1, 71 Iowa, 41, 32 N. W. Rep. 18; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. Rep. 559, 12 L. R. A. 257; Budd v. United Carriage Co., 25 Ore. 314, 35 Pac. Rep. 660, 27 L. R. A. 279; Nichols-

chargeable with contributory negligence — that is, with making his own act in part the efficient cause — for acting erroneously in a position of sudden danger in which he is placed by the negligence or fault of another. If, therefore, a stage-coach is upset by the negligence of the driver, and a passenger therein, under the impulse of fear, acts in a manner which results in an injury to himself, where, had he remained calm and kept his place, he would have escaped harm, he will not thereby be precluded from recovering damages of the carrier.<sup>1</sup> A case arose in Massachusetts in which the immediate cause of the injury was the act of the plaintiff, and yet a defect in a highway was held to be the proximate and efficient cause thereof, though other circumstances contributed. The alleged defect was a culvert extending across the highway and a hole at one end of the culvert. As the plaintiffs (husband and wife) were driving together in their wagon along the traveled part of the [64] highway between the hours of eight and nine in the evening, a band of musicians, a little way in advance, commenced to play, by which the horse was alarmed; this happened near the alleged defect in the highway. In the course of the incident the wife was taken up from the ground at or near the culvert, seriously injured; but the precise manner in which she came to the ground, whether by being forcibly thrown from the wagon, by leaping from it, or by the two actions concurring, and whether the wagon did or did not come into contact with the hole, were questions of fact. There was a variance between the proof and the declaration for which the judgment was reversed, but this instruction was approved: “When a party is traveling on a highway and there is a defect

burg v. Second Avenue R. Co., 11 N. Y. Misc. 432, 32 N. Y. Supp. 130; Baker v. North East Borough, 151 Pa. 234, 21 Atl. Rep. 1079; Hookey v. Oakdale, 5 Pa. Super. Ct. 404; Vallo v. United States Exp. Co., 147 Pa. 404, 14 L. R. A. 743, 23 Atl. Rep. 594, 30 Am. St. 741; Quinn v. Shamokin, etc. R. Co., 7 Pa. Super. Ct. 19; Washington, etc. R. Co. v. Hickey, 5 D. C. App. Cas. 436; South Covington & C. R. Co. v. Ware, 84 Ky. 267, 1 S. W. Rep. 493; Cody v. New York, etc. R. Co., 151 Mass. 462, 24 N. E. Rep. 402, 7 L. R. A. 843; Connell v. Prescott, 20 Ont. App. 49; Ellick v. Wilson, 58 Neb. 584, 79 N. W. Rep. 152; Galveston, etc. R. Co. v. Zantzinger, 92 Tex. 365, 44 L. R. A. 553, 48 S. W. Rep. 563; Postal Tel. Cable Co. v. Hulsey, 132 Ala. 444, 453, 31 So. Rep. 527; Texas & P. R. Co. v. Watkins, 26 S. W. Rep. 760 (Tex. Civil Appeals). See § 23a.

<sup>1</sup> Id.; Stokes v. Saltonstall, 13 Pet.



in it, and the party, under apprehensions of an imminent peril, by the near approach of his carriage to the defect in the highway, but without or previous to actual contact with the defect, leaps from his carriage and is injured thereby, then the rule of law is this: it is an element of reasonable care on the part of the plaintiff. If the plaintiff be placed, by reason of the defect in the highway and his approach thereto, in such a situation as obliges him to adopt the alternative of a dangerous leap, or to remain at a certain peril, and he leaps and is injured, then, all the conditions of liability being fulfilled, he may recover damages of the party responsible for the repair of the highway."<sup>1</sup> A lad aged ten years was forcibly put on a freight train and carried five miles. After being released he ran most of the distance to his home, was afterward taken sick and became permanently crippled. The jury found that this was the result of the trespass; a majority of the court refused to interfere with the verdict.<sup>2</sup> It is a rule of general application that the concurrence of an infant plaintiff's natural indiscretion with the defendant's negligence will not relieve the latter from responsibility for an act which results in injury to the former.<sup>3</sup>

§ 40. **Act of third person.** The innocent or culpable act of a third person may be the immediate cause of the injury, and still an earlier wrongful act may have contributed so effectually to it as to be regarded as the efficient, or at least concurrent and responsible, cause.<sup>4</sup> The noted squib case is [65]

<sup>1</sup> *Lund v. Tyngsboro*, 11 Cush. 563; *Flagg v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674, 8 N. E. Rep. 42. See § 26.

<sup>2</sup> *Drake v. Kiely*, 93 Pa. 492.

<sup>3</sup> *Pittsburg, etc. R. Co. v. Caldwell*, 74 Pa. 421; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Holly v. Boston Gas Co.*, 8 Gray, 123, 69 Am. Dec. 233; *Stillson v. Hannibal, etc. R. Co.*, 67 Mo. 671; *Lane v. Atlantic Works*, 111 Mass. 136; *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490. See *Singleton v. Eastern Counties R. Co.*, 7 C. B. (N. S.) 287; *Hughes v. Macfie*, 2 H. & C. 744; *Nangan v.*

*Atterton*, L. R. 1 Ex. 239; *Lynch v. Nurdin*, 1 Q. B. 29.

<sup>4</sup> *Burrows v. March, etc. Gas Co.*, L. R. 5 Ex. 67; *Lannen v. Albany Gas Co.*, 44 N. Y. 459; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Scholes v. North London R. Co.*, 21 L. T. (N. S.) 835; *Pastene v. Adams*, 49 Cal. 87; *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. Rep. 608, 12 Daly, 431; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. Rep. 398, 52 Am. St. 146, 31 L. R. A. 220; *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. Rep. 751, quoting

an example.<sup>1</sup> The defendant threw a squib into the market-house where it first fell; a person, to save himself, threw it off, and where it then fell it was again thrown for like reason, and struck and injured the plaintiff. It was held that the defendant's act so directly caused the injury that trespass would lie. A defendant stopped his team, and negligently left it in a business street without being hitched or otherwise secured. It started and ran violently along the street and collided with another team, which, though properly hitched at the side of the street, was frightened, broke from its fastenings and ran across the street against a horse and sleigh belonging to the plaintiff, injuring the former. It appeared that while the defendant's horses were running and before they had collided with the other horses, a crowd of persons came into the street, hallooed and raised their hats for the purpose of stopping the horses, which caused them to swerve from the course they were taking, and in this manner they came in contact with the second team. The law was said to be well settled that when the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant or through his culpable negligence, the fact that a third party by his wrong or negligence contributed to the injury does not relieve him

the text; *Chicago City R. Co. v. Cooney*, 95 Ill. App. 471; *Postal Tel. Cable Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. Rep. 633; *Choctaw, etc. R. Co. v. Halloway*, 114 Fed. Rep. 458, 52 C. C. A. 260, and cases cited; *Coleman v. Bennett*, — Tenn. —, 69 S. W. Rep. 734.

The connection between the sale of unlabeled poison and the death of a child who takes it is not broken because its mother left the poison within the infant's reach, she not knowing it to be poison, nor by the infant's act in taking it. *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. Rep. 971, 44 L. R. A. 548.

In *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490, a child was on the platform of a car by direction of the conductor. By the rushing of another passenger for

the purpose of getting off the car the child was pushed therefrom. Such conduct was not a justification to the defendant for its negligence in placing the child on the platform.

In *Macer v. Third Avenue R. Co.*, 47 N. Y. Super. Ct. 461, the plaintiff's injuries were increased by an effort made by the defendant's servant to prevent them. The original negligence was held to be the proximate cause.

A workman who is injured by a defective instrument used by a fellow workman has a cause of action against the master. *Ryan v. Miller*, 12 Daly, 177.

<sup>1</sup> *Scott v. Shepherd*, 2 W. Bl. 892; *Owen v. Cook*, 9 N. D. 134, 81 N. W. Rep. 285, 47 L. R. A. 646; *Bradley v. Andrews*, 51 Vt. 530.

from liability. Referring to the facts, it was observed: "The running away, from the starting of the defendant's team till the collision, was a single transaction; and whatever influence the interposition of the crowd had in occasioning the collision, it was not the sole cause; the running away, which occurred through the defendant's negligence, was, in part at least, the occasion of it; both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the collision occurred, under the rule we have stated, he is liable." Again: "All the consequences which actually resulted in this case from the running away of the defendant's team might, we think, reasonably have been expected to occur from the running away of any team under similar circumstances in the principal business street of a town; and the running away of the defendant's team was the efficient cause of the injury to the plaintiff's [66] horse because it put in operation the force which was the immediate and direct cause of the injury."<sup>1</sup> In another case a team of horses, attached to a truck and unattended in a street, were stopped, after going a few yards, by a stranger, who, in trying to drive them to where they had been left, drove the truck against a push cart standing in the street, overturned the cart and injured the plaintiff. The negligence of the person who had charge of the horses was the proximate cause of the injury. They should not have been left in the middle of the carriage way obstructing travel, besides subjecting other travelers to danger. The condition which authorized the bystander to stop the horses also authorized him to drive them to a position where they would cease to be an obstruction and a menace to travel. A danger to be fairly anticipated from leaving horses unattended in a public street is that, if they start to run off, the persons who attempt to stop them may be careless or ignorant of the management of horses and thus jeopardize the safety of people on the highway. In such cases so leaving the horses is the proximate cause of the accident.<sup>2</sup>

<sup>1</sup> Griggs v. Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Billman v. Indianapolis, etc. R. Co., 76 Ind. 166, 40 Am. Rep. 230; McDonald v. Snelling, 14 Allen, 292; McCahill v. Kipp, 2

E. D. Smith, 413; Pearl v. Macauley, 6 App. Div. 70, 39 N. Y. Supp. 472.  
<sup>2</sup> Williams v. Koehler, 41 App. Div. 426, 58 N. Y. Supp. 863.

An assessor of a town altered an assessment after it had been perfected and lodged with another officer, and after his power over it had ceased; he altered it in such a manner that the property of the plaintiff was rated at a higher sum. The selectmen made out a rate-bill by which the plaintiff was charged with an increased amount and procured a tax warrant which they placed in the hands of the collector. The plaintiff refusing to pay the illegal portion of the tax, the selectmen, with a full knowledge of all the facts, directed the collector to levy and collect it. The levy was made, the plaintiff then paid the tax and afterwards brought an action on the case against the assessor for the injury. The jury were rightly instructed that the action of the selectmen in directing the levy, although it might make them liable, would not affect the right of the plaintiff to recover against the defendant for the wrongful alteration and he was entitled to recover for the injury resulting from the levy.<sup>1</sup> An officer who makes a false return of *non est* to a summons is not relieved from liability because an order for service by publication intervened between his act and a judgment by default. Such order was the natural result of such return, and the further action of the court was the legitimate consequence of it.<sup>2</sup> It is negligence to leave a railroad turntable in such condition that it may be revolved by children;<sup>3</sup> and the negligence continues so as to render the owner liable for an injury caused to a child by the revolving of the table by other children.<sup>4</sup> A person who has the management and control of a public place of amusement, which he invites the public, on payment of an admission fee, to attend and at which he sells to his customers intoxicating liquors, who sells to one in attendance there liquor in such quantity as to make him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others, without provocation or cause, is bound to exercise reasonable care to protect his other

<sup>1</sup> Bristol Manuf. Co. v. Gridley, 28 Conn. 201, 27 id. 221, 71 Am. Dec. 56.

<sup>2</sup> State v. Finn, 87 Mo. 310, reversing 11 Mo. App. 400.

<sup>3</sup> Koons v. St. Louis, etc. R. Co., 65 Mo. 592.

<sup>4</sup> Nagel v. Missouri Pacific R. Co., 75 Mo. 653; Boggs v. Same, 18 Mo. App. 274; Morrison v. Kansas City, etc. R. Co., 27 id. 418; Gulf, etc. Ry. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. 755, 14 S. W. Rep. 26.

patrons from the assaults and insults of such person, and for a failure to so do is liable to a person assaulted by him.<sup>1</sup>

§ 41. **Same subject.** The subject under consideration is well illustrated by those cases in which a party has suffered a special injury at the hands of third persons in consequence of the speaking of slanderous words. Where the injurious act of the third person is shown with the requisite certainty to have been the consequence of the defendant's speaking such words the action has been sustained.<sup>2</sup> In case for slanderous words by reason of which the plaintiff was turned out of her lodgings and employment, it appeared that the defendant complained to E., the mistress of the house and his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows; and he added that no moral person would like to have such people in his house. E. stated in her evidence that she dismissed the plaintiff in consequence of the words, not because she believed them, but because she [67] was afraid it would offend her landlord if the plaintiff remained. The action was held maintainable, the special damages, which were its gist, being the consequence of the slanderous words used. The witness' statement that she did not dismiss the plaintiff because she believed the words spoken was not allowed to defeat the action. Lord Denman, C. J., said: "It would be speculating too finely on motives, and such a disposition in the court would too often put it in the power of the unwilling witness to determine a cause against the plaintiff. The proper question is whether the injury was sustained in consequence of the slanderous words having been used by the defendant."<sup>3</sup> But the injury must be the natural and proximate consequence. Damage caused by the repetition of the words by a third person who heard them uttered by the defendant is too remote,<sup>4</sup> unless the latter authorized or suggested their repetition, or there was some duty on the hearer to repeat them.<sup>5</sup> Such a spontaneous and unauthorized com-

<sup>1</sup> Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. Rep. 913; Romnel v. Schambacher, 120 Pa. 579, 11 Atl. Rep. 779.

<sup>2</sup> Fuller v. Fenner, 16 Barb. 333; Hallock v. Miller, 2 Barb. 630; Moody v. Baker, 5 Cow. 351; Ward v. Weeks,

7 Bing. 211; Bateman v. Lyall, 7 C. B. (N. S.) 638; Williams v. Hill, 19 Wend. 305.

<sup>3</sup> Knight v. Gibbs, 1 Ad. & E. 43.

<sup>4</sup> Ward v. Weeks, 7 Bing. 211.

<sup>5</sup> Adams v. Kelly, Ry. & Moo. 157; Parkes v. Prescott, L. R. 4 Ex. 169;

munication, it is said, cannot be considered as the necessary consequence of the original uttering of the words.<sup>1</sup>

If the injury inflicted is not the reasonable and natural result of a wrongful act of the defendant, but was caused by such act of a third person, though it was remotely induced by defendant's conduct, he is not liable.<sup>2</sup> Thus, in an action by one engaged in the business of butchering for selling diseased sheep as sound and healthy, it appeared that the plaintiff had engaged one G. to take some of the mutton which might be on hand and sell it; but in consequence of a report that the plaintiff had purchased the defendant's diseased sheep, G. refused to perform his contract. It was held that the defendant was not [68] liable for G.'s refusal, nor for damages suffered by the plaintiff in consequence of his customers refusing to deal with him by reason of that report.<sup>3</sup> In an action against several persons, some of whom had sold the plaintiff's husband liquors on the day of his death and others of whom had done so previously, and were charged with having caused him to become an habitual drunkard, death was held to be the result of the sales last made; and the fact that the liquor last obtained was drunk because he was an habitual drunkard did not make those who had antecedently sold him liquor jointly liable with the other defendants, because the latter's intervening acts were independent and the proximate cause of the wrong.<sup>4</sup> This principle does not apply where the intervening act of a third person is not direct, wilful or criminal, as where a person who is intoxicated is run over by a train while lying on a track situated between his home and the place where he procured the liquor which produced that condition.<sup>5</sup> If there intervenes

Kendillon v. Maltby, Car. & M. 402; Pilmore v. Hood, 5 Bing. N. C. 97; Derry v. Handley, 16 L. T. (N. S.) 263; Allsop v. Allsop, 5 H. & N. 534; Schoepflin v. Coffey, 162 N. Y. 13, 56 N. E. Rep. 502, and cases cited; Bentley v. Reynolds, 1 McMull. 16, 36 Am. Dec. 251; Underhill v. Welton, 32 Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Elmer v. Fessenden, 151 Mass. 359, 5 L. R. A. 724, 24 N. E. Rep. 208; Haehl v. Wabash R. Co., 119 Mo. 325, 24 S. W. Rep. 737.

<sup>2</sup> Ward v. Weeks, 7 Bing. 211.

<sup>3</sup> Crain v. Petrie, 6 Hill, 522, 41 Am. Dec. 765; Butler v. Kent, 19 Johns. 223, 10 Am. Dec. 219.

<sup>1</sup> Id. See Riding v. Smith, 1 Ex. Div. 91; Kelly v. Partington, 5 B. & Ad. 645; Morris v. Langdale, 2 B. &

<sup>4</sup> Tetzner v. Naughton, 12 Ill. App. 148. See Shugart v. Egan, 83 Ill. 56.

<sup>5</sup> Schroeder v. Crawford, 94 Ill. 357; P. 284; Ashley v. Harrison, 1 Esp. 48; Emory v. Addis, 71 Ill. 273.

between defendant's act or omission a wilful, malicious and criminal act committed by a third person, which act defendant had no reason to apprehend, the connection between the original wrong and the result is broken.<sup>1</sup>

§ 42. **Same subject.** Where the immediate cause of the injury is the wrongful act of a third person, the injured party has, of course, an action against him; and this, in some early cases, was thought to bar an action against any antecedent actor more remotely responsible; but it now seems to be settled that the liability of the more immediate party does not relieve any other party whose act can properly be treated as the efficient and proximate or concurrent cause. A vendor of property, who had been paid for it, was induced by the defendant's false and malicious representation that he had a lien on it and was entitled to control its custody, to refuse to deliver it, whereby the purchaser suffered injury; he was held entitled to his action although he had a remedy on his contract against the vendor. Knowingly making a false claim of lien was the *gravamen* of the action, and the special damage alleged, namely, the non-delivery of the property, was sufficiently connected with the wrongful act to support the action.<sup>2</sup> In one case it appeared that the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; B. having, to the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of B., it was held that an action would lie for the circuitous deceit practiced.<sup>3</sup>

The Indiana court announced a rule contrary to that stated in the text in *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559. But these cases are much restricted by *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, and are in effect overruled by *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 355, 49 Am. Rep. 168.

<sup>1</sup>*Shugart v. Egan*, 83 Ill. 56; *Mars v. Delaware & H. Canal Co.*, 54 Hun, 625, 8 N. Y. Supp. 107; *Roach v. Kelly*, 194 Pa. 24, 44 Atl. Rep. 1090, 75 Am.

St. 685; *White v. Conly*, 14 Lea, 51. In the last case W. and C. quarreled and fought; during the fight W.'s son stabbed C. and caused his death. This was done without the knowledge of W.

<sup>2</sup>*Green v. Button*, 2 Cr., M. & R. 707.

<sup>3</sup>*Pilmore v. Hood*, 5 Bing. N. C. 97. *Bosanquet, J.*, thus stated the facts and the grounds of the defendant's liability: "It appears that the defendant entered into a contract of sale of a public house with a person

[69] A stage-coach by the negligence of the driver was precipitated into a dry canal; the lock-keeper thereafter negligently opened the gates of the canal and a passenger was drowned therein. Under Lord Campbell's act<sup>1</sup> the Irish court of queen's bench held that the death of the passenger was "caused" by the negligence of the driver. O'Brien, J., said: "The precipitation of the omnibus into the lock was certainly one cause of her death, inasmuch as she would not have drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation by the negligence of the defendant's servant. But in my opinion the [70] defendant is not relieved from liability for his primary neglect by showing that but for such subsequent act the death

of the name of B.; that when the agreement was entered into he represented to B. that the public house was of a certain value in respect of its trade, and that representation he knew to be false at the time he made it. After this agreement had been entered into with B., B., finding himself unable to complete the contract, entered into a negotiation with the plaintiff, P., and informed him what representation he had received of the value of this public house from the defendant; and taking it according to the plea, that B. had not any particular authority from the defendant to make such communication to P., the defendant had notice that the information had been given to P., and it is averred that both at the time of the original agreement with B., as also at the time of the agreement which subsequently took place with P., the defendant knew that the information was false. Then having notice that that communication had been made, and knowing at the time that it was false, he enters into a new agreement with P. and B.

that P. shall stand in the place of B. in the purchase of this public house. The record further states that P., confiding in that representation, paid money to the defendant. I think it is impossible, on the statement of these facts, not to see that the defendant when he entered into that contract with B., having thus himself made the fraudulent representation, and knowing it to have been communicated to the person with whom he was about to contract a second time, then withholding an explanation or denial of his authority for communication, and suffering the plaintiff, on the faith of the communication, to enter into a contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself. On these grounds, without entering further into the case, I think this action may be maintained." See *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337; *Richardson v. Dunn*, 8 C. B. (N. S.) 655; § 1170.

<sup>1</sup> 9 and 10 Vict., ch. 93.



would not have ensued.”<sup>1</sup> A railroad company placed a push-car in the hands of a foreman to be used for specific purposes; he loaned it for another purpose, and while the borrower was using it plaintiff was injured through the negligence of the borrower. The company was liable though such injury occurred at a time when there was no relation between it and the man who ran the car.<sup>2</sup>

Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal acts of another or for an injury from other causes; as where a street-car driver permits boys to ride on the platform without paying fare, and on their being ordered to get off one of them pushes another, who is injured. In such cases the injury is too remote,<sup>3</sup> unless it was such as would probably result; and the same rule applies where inaction offers an opportunity for injury. The neglect of duty by bailees and agents renders them liable for losses resulting, in co-operation with such neglect, by the torts of third persons.<sup>4</sup> The cases collected in the note following will give the reader an insight into various branches of the subject of consequential damages.<sup>5</sup>

<sup>1</sup> *Byrne v. Wilson*, 15 Irish C. L. (N. S.) 332-342, *Thompson's Car. Pass.* 290; *Eaton v. Boston, etc. R. Co.*, 11 Allen, 500, 87 Am. Dec. 730; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570.

<sup>2</sup> *Erie R. Co. v. Salisbury*, 66 N. J. L. 233, 50 Atl. Rep. 117. The court was divided, 6 to 5.

<sup>3</sup> *Lott v. New Orleans, etc. R. Co.*, 37 La. Ann. 337, 55 Am. Rep. 500; *Cuff v. Newark, etc. R. Co.*, 35 N. J. L. 30, 10 Am. Rep. 205; *Scholes v. North London R. Co.*, 21 L. T. (N. S.) 835; *Marks v. Rochester R. Co.*, 41 App. Div. 66, 58 N. Y. Supp. 210.

<sup>4</sup> *Norcross v. Norcross*, 53 Me. 163; *Mason v. Thompson*, 9 Pick. 280, 20 Am. Dec. 471; *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628; *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745; *Sasseen v. Clark*, 37 Ga. 242; *Clute v. Wiggins*, 14 Johns. 175; *McDaniels v. Robinson*, 26 Vt. 316.

<sup>5</sup> *Adams v. Lancashire, etc. R. Co.*, L. R. 4 C. P. 739; *Smith v. Dobson*, 3 M. & Gr. 59; *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, id. 243; *Barnes v. Ward*, 9 C. B. 392; *Collins v. Middle L. Com'rs*, L. R. 4 C. P. 279; *Harrison v. Great Northern R. Co.*, 3 H. & C. 231; *Butterfield v. Forrester*, 11 East, 60; *Martin v. Great Northern R. Co.*, 16 C. B. 179; *General Steam Nav. Co. v. Mann*, 14 C. B. 127; *Holden v. Liverpool Gas Co.*, 3 C. B. 1; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Flower v. Adam*, 2 Taunt. 314; *Ellis v. London, etc. R. Co.*, 2 H. & N. 424; *Singleton v. Williamson*, 7 H. & N. 410; *Skelton v. London, etc. R. Co.*, L. R. 2 C. P. 631; *Thompson v. North-eastern R. Co.*, 2 B. & S. 106; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Glover v. London, etc. R. Co.*, 3 Q. B. 25; *The Flying Fish*, 34 L. J. (Adm.) 113; *Everard v. Hopkins*, 1 Bulst. 332; *Hughes v. Quentin*, 8 C.

§ 43. **Wilful or malicious injuries.** The authorities are [71] not agreed as to whether in cases of wilful or malicious injuries, injuries caused by reckless or illegal acts, or by positive fraud, the damages are so strictly confined to proximate consequences as when none of these elements is present. On principle, at least where exemplary damages are allowed, it is not readily seen why the doctrine of proximate cause should be varied because of the presence or absence of facts which characterize the wrong. In Indiana the existence of any such reason is denied;<sup>1</sup> in some other states, as will be seen in the

& P. 703; *Peacock v. Young*, 21 L. T. (N. S.) 527; *Priestley v. Maclean*, 2 F. & F. 288; *Sneesby v. Lancashire R. Co.*, L. R. 9 Q. B. 263; *Smith v. Condry*, 1 How. 35; *Loker v. Damon*, 17 Pick. 284; *State v. Thomas*, 19 Mo. 613; *Oil Creek, etc. R. Co. v. Keighron*, 74 Pa. 316; *Tarleton v. McGawley*, Peake, 270; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, id. 574; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Bartlett v. Hooksett*, 48 N. H. 18; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Dimock v. Suffield*, 30 Conn. 129; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Howard v. North Bridgewater*, 16 Pick. 189; *Kingsbury v. Dedham*, 13 Allen, 186, 90 Am. Dec. 191; *Tisdale v. Norton*, 8 Met. 388; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Bigelow v. Reed*, 51 Me. 325; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Cobb v. Standish*, 14 Me. 198; *Merrill v. Hampden*, 26 Me. 234; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Davis v. Bangor*, 42 Me. 522; *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Cook v. Charlestown*, 98 Mass. 80; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Chicago v. Hoy*, 75 Ill. 530; *Pittsburgh, etc. R. Co. v. Iddings*, 28 Ind. App. 504, 62 N. E. Rep. 112;

*Wallin v. Eastern R. Co.*, 83 Minn. 149, 86 N. W. Rep. 76, 54 L. R. A. 481; *Butler-Ryan Co. v. Williams*, 84 Minn. 447, 88 N. W. Rep. 3; *Fezler v. Willmar, etc. R. Co.*, 85 Minn. 252, 88 N. W. Rep. 746; *Schreiner v. Great Northern R. Co.*, 86 Minn. 245, 90 N. W. Rep. 400; *Illinois Central R. Co. v. Seamans*, 79 Miss. 106, 31 So. Rep. 546; *Leeds v. New York Telephone Co.*, 64 App. Div. 484, 72 N. Y. Supp. 250; *Harrison v. Weir*, 71 App. Div. 248, 75 N. Y. Supp. 909; *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913; *Chambers v. Carroll*, 199 Pa. 371, 49 Atl. Rep. 128; *Forrow v. Arnold*, 22 R. I. 305, 47 Atl. Rep. 693; *Butts v. Cleveland, etc. R. Co.*, 110 Fed. Rep. 329, 49 C. C. A. 69; *Reynolds v. Piereson*. — Ind. App. —, 64 N. E. Rep. 484; *Simonson v. Minneapolis, etc. R. Co.*, — Minn. —, 92 N. W. Rep. 459.

<sup>1</sup>“There is, in truth, no case that has been recognized as sound, that holds that the rule as to the responsibility of the wrong-doer is different in cases of actionable negligence from that which prevails in cases of wilful or malicious torts. There is a difference as to the measure of damages, for where the tort is malicious exemplary damages may be recovered, but such damages cannot be recovered in cases of negligence. This consideration has, however, no influence upon the question of a negligent wrong-doer's responsibility

next section, such distinction is recognized. The elements stated are aggravations which juries are apt to regard in determining their verdicts, and which courts consider in passing on them.<sup>1</sup> It was said by Baldwin, J.:<sup>2</sup> "When a trespass is committed in a wanton, rude and aggravated manner, indicating malice or a desire to injure, the jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation," and to superadd to such compensation a sum for punishment. In a case of wilful negligence the trial court instructed the jury that they might take into consideration all the circumstances, and see whether there was anything to satisfy them that the defendant had behaved in an improper and unjustifiable manner; and if so, they need not give damages strictly, but might give them with a liberal hand. This instruction was approved. Pollock, C. B., in giving judgment, said: "It is universally felt by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than an accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are some- [72] times given in actions of trespass; but the measure of damage should be different according to the nature of the injury and the circumstances with which it is accompanied. . . . The

for the consequences resulting from his act." *Indianapolis, etc. R. Co. v. Pitzer*, 109 Ind. 179, 189, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 id. 70. Compare *Kline v. Kline*, 153 Ind. 602, 64 N. E. Rep. 9. See *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. 17; note to *Gilson v. Delaware, etc. Canal Co.*, 36 Am. St. 821, in which numerous cases are summarized and the conclusion is reached that there is no essential difference between the measure of liability for wilful and negligent torts, and that in both cases the injury complained of must

be a natural and direct result, the only exceptions being where a wilful tort consists in the unlawful assumption of dominion over another's property, and where a carrier deviates from its route.

<sup>1</sup> *Merest v. Harvey*, 5 Taunt. 442; *Wright v. Gray*, 2 Bay. 464; *McDaniel v. Emanuel*, 2 Rich. 455; *Detroit Daily Post v. McArthur*, 16 Mich. 447; *West v. Forrest*, 22 Mo. 344; *Huckle v. Money*, 2 Wils. 205; *McAfee v. Crofford*, 13 How. 447.

<sup>2</sup> *Pacific Ins. Co. v. Conard*, Baldwin, 142.

courts have always recognized the distinction between damages given with a liberal and a sparing hand.”<sup>1</sup> For this reason all the circumstances of the injurious act are provable and to be considered by the jury.<sup>2</sup> In an action of tort for a wilful injury to the person the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.<sup>3</sup> The same view is expressed by another court: “The common sense of mankind has never failed to see that the damage done by a wilful wrong to person or reputation, and, in some cases, to property, is not measured by the consequent loss of money. A person assaulted may not be disabled or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money directly or consequentially. He may incur no pecuniary damage whatever. . . . When the law gives an action for a wilful wrong it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.”<sup>4</sup>

<sup>1</sup> *Emblen v. Myers*, 6 H. & N. 54; *Bixby v. Dunlap*, 56 N. H. 462.

<sup>2</sup> *Bracegirdle v. Orford*, 2 M. & S. 79; *Snively v. Fahnestock*, 18 Md. 391; *Treat v. Barber*, 7 Conn. 279; *Edwards v. Beach*, 3 Day, 447; *Churchill v. Watson*, 5 Day, 140, 5 Am. Dec. 130; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

<sup>3</sup> *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

<sup>4</sup> *Welch v. Ware*, 32 Mich. 77; *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764; *De Leon v. McKernan*, 25 N. Y. Misc. 182, 54 N. Y. Supp. 167; *Rigney v. Monette*, 47 La. Ann. 648, 17 So. Rep. 211; *Taylor v. Howard*, 110 Ala. 468, 18 So. Rep. 311; *Railway Co. v. Beard*, 56 Ark. 309, 19 S. W. Rep. 923; *Watson v. Dilts*, — Iowa, —, 89 N. W. Rep. 1068, 57 L. R. A. 559. See §§ 1028, 1029.

§ 44. **Same subject.** There are, however, authorities which go to the extent of holding that where a wrong is done wilfully and with knowledge of all the facts which make the doing of it an aggravation, the scope of the natural and proximate consequence of such wrong is thereby enlarged. Where a tenant, whose wife was sick at the expiration of the lease, was denied a reasonable time in which to vacate the premises without out unnecessary risk to her, and the landlord, knowing that she was pregnant and confined to her bed by heart disease, began tearing down the house, thereby making a noise and causing a dust, which aggravated the wife's illness, who, though removed from the premises the next day, died a week later, after having had a miscarriage, it was decided that the rule of the court of final appeal<sup>1</sup> denying a recovery for injuries due solely to fright and excitement, unaccompanied by actual, immediate, personal injury, had no application. "In that case it was held that no recovery could be had for mere fright occasioned by negligence; and as no action would lie for the fright alone, it necessarily followed that none could be maintained merely because the fright was followed by serious consequences. If the act complained of was not in itself actionable the gravity of the consequences would not make it so. In this case, however, the act of the defendants was in itself wrongful. It was a wilful and violent trespass upon the plaintiff's house for which an action will lie; and if the death of the plaintiff's wife can be clearly and directly traced to it as a natural and necessary consequence which they might, or should, have reasonably anticipated, the defendants are liable even although no actual blow was struck in the course of the destruction of the building. The defendants knew her condition and the risk which was involved in their contemplated act, and it would be ridiculous to say that, without the shadow of a right, they could tear the house down from over her head with no liability for the consequences unless she chanced to be hit by a falling beam."<sup>2</sup> Substantially the same rule was applied where the

<sup>1</sup> *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. Rep. 354, 56 Am. St. 604, 34 L. R. A. 781. See §§ 21-24.

<sup>2</sup> *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890; *Williams v.*

*Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291. See quotation from *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. Rep. 88, 38 L. R. A. 512, in note to § 21.

defendant, intending to have a practical joke, represented to a married woman, who was in an ordinary state of health and mind, that her husband had met with a fearful accident; the statement was made with intent that it should be believed, and it was believed; in consequence a violent nervous shock was produced which rendered plaintiff ill. Her right to maintain an action was vindicated, and judgment rendered on a verdict for £100 on account of the injury caused by the shock.<sup>1</sup> In an action for maliciously and wilfully making false statements respecting the plaintiff in his capacity as an apprentice to the defendant, and which had the effect to deprive the plaintiff of the employment on which he relied for support, there may be a recovery for injury to feelings. Such an accusation would naturally cause the plaintiff mental suffering and anxiety in reference not only to the estimation in which he would be likely to be held by his employer, or by others to whom the fact of his discharge might become known, but also as to its effect upon his income, through the loss of his situation.<sup>2</sup> In Vermont it is not necessary that an act be wanton in order that liability for all the injurious consequences result from it. If it is voluntary and not obligatory it is enough. Thus where

<sup>1</sup> *Wilkinson v. Downton*, [1897] 2 Q. B. 57. After referring to cases which are discussed in §§ 21-24, and admitting that the case was without precedent, the court said: A more serious difficulty is the decision in *Allsop v. Allsop*, 5 H. & N. 534, which was approved by the house of lords in *Lynch v. Knight*, 9 H. of L. Cas. 577. In that case it was held by Pollock, C. B., Martin, Bramwell, and Wilde. BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damages as would sustain an action for such slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage and that it would be of evil consequence to treat

it as sufficient, because such a rule might lead to an infinity of trumpetry or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. See *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. Rep. 335, 80 Am. St. 577.

<sup>2</sup> *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. Rep. 1125, 31 Am. St. 528.

defendant shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog, he was liable.<sup>1</sup> Where a dog was wantonly and maliciously shot at, with intent to kill it, and was set wildly in motion, and that motion continued, without the interruption of any other agency, until the dog got into its owner's house and there knocked down and injured his wife, the defendant was liable for her injury.<sup>2</sup> In a case in which recovery for injury to business was sought the court said: The defendant's conduct was so lawless and malicious that on that ground alone he might properly be held responsible for damages more indefinite than in ordinary instances where elements of malice and oppression are lacking.<sup>3</sup> In another case it was observed: We have no doubt that where the act charged was wilfully, wantonly or maliciously done, and especially where its obvious purpose was to wound, humiliate or oppress another, substantial damages may be given for the mental suffering it entailed.<sup>4</sup>

The effect of fraud in causing a loss on the amount recoverable beyond the measure of damages in analogous cases of breach of contract and tort is manifest in many particulars. A difference is made on this ground when there is a breach of the contract to sell and convey lands, and where there is a confusion of goods. Where one sells a chattel and delivers possession, so that he is taken to have warranted the title, his vendee cannot recover damages until he is dispossessed by the true owner; but if he sells property with a false and fraudulent representation of ownership, his vendee may recover damages for the deceit before he is disturbed in his possession and according to the measure of damages applicable to a breach of warranty.<sup>5</sup> It was held by Lord Kenyon that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, and that damages might be re-

<sup>1</sup> Wright v. Clark, 50 Vt. 130 28, Am. Rep. 496.

<sup>2</sup> Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. Rep. 585, 67 Am. St. 691, 45 L. R. A. 87.

<sup>3</sup> Gildersleeve v. Overstolz, 90 Mo. App. 518, 530.

<sup>4</sup> Hickey v. Welch, 91 Mo. App. 4,

14; Cooper v. Hopkins, 70 N. H. 271, 279, 48 Atl. Rep. 100; Kimball v. Holmes, 60 N. H. 163; Kline v. Kline, 158 Ind. 602, 64 N. E. Rep. 9, 58 L. R. A. 397.

<sup>5</sup> Case v. Hall, 24 Wend. 102, 35 Am. Dec. 605.

covered for loss of their trade.<sup>1</sup> Where a dealer in drugs and medicines carelessly labels a deadly poison and sends it so labeled into market, he will be held liable to all persons who, without fault, are injured by using it as such medicine as it purports to be.<sup>2</sup> So, a party who fraudulently sold a gun falsely representing it to have been made by a particular maker and to be well made, was held liable to the purchaser whose son was injured by its explosion.<sup>3</sup> Without regard to the question of warranty, a vendor of disinfectant powder put up in a tin can who knows that it was likely to cause injury to a person who might open it, unless special care is taken in doing so, the danger not being such as presumably would be known to or appreciable by the purchaser, unless warned of it, is bound to give such warning or answer for the consequences of his neglect to the purchaser.<sup>4</sup> In several states the expenses of the suit, above taxable costs, to obtain redress for such wrongs, are allowed to be considered by the jury.<sup>5</sup> But in some states it is otherwise.<sup>6</sup>

#### SECTION 4.

##### CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT.

#### § 45. Recoverable only when contemplated by the parties.

[74] In an action founded upon a contract only such damages can be recovered as are the natural and proximate consequence of its breach; such as the law supposes the parties to it would have apprehended as following from its violation if at the time they made it they had bestowed proper attention upon the subject and had full knowledge of all the facts.<sup>7</sup> As otherwise expressed, the damages which are recoverable must be

<sup>1</sup> Tarleton v. McGawley, Peake, 205.

<sup>2</sup> Thomas v. Winchester, 6 N. Y. 397.

<sup>3</sup> Langridge v. Levy, 2 M. & W. 519; Levy v. Langridge, 4 id. 337. See Rose v. Beattie, 2 N. & McC. 538; Fultz v. Wycoff, 25 Ind. 321.

<sup>4</sup> Clarke v. Army & Navy Co-operative Society, [1903] 1 K. B. 155, in the court of appeal.

<sup>5</sup> Dibble v. Morris, 26 Conn. 416; Roberts v. Mason, 10 Ohio St. 278;

Seeman v. Feeney, 19 Minn. 79; Titus v. Corkins, 21 Kan. 722; Marshall v. Betner, 17 Ala. 832; Thompson v. Powning, 15 Nev. 210; New Orleans, etc. R. Co. v. Albritton, 38 Miss. 243, 75 Am. Dec. 98.

<sup>6</sup> Earle v. Tupper, 45 Vt. 274; Howell v. Scoggins, 48 Cal. 355.

<sup>7</sup> Leonard v. New York, etc. Tel. Co., 41 N. Y. 544, 567, 1 Am. Rep. 446; Meyer v. Haven, 70 App. Div. 529, 535, 75 N. Y. Supp. 261; Smith v. Western U. Tel. Co., 83 Ky. 104.



incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into.<sup>1</sup> Direct damages are always recoverable, and consequential losses must be compensated if it can be determined that the parties contracted with them in view.<sup>2</sup> It is not in the least essential to the existence of this liability that an actual breach of the agreement should have been in the minds of the parties or either of them. For anything which amounts to a breach of contract, whether foreseen or unforeseen, the party who is responsible therefor must answer.<sup>3</sup> Here an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of contract. The wrong-doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated.<sup>4</sup> But for breaches of contracts the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts, and were within the contemplation of the parties when the contract was entered into as likely to result from its non-performance.<sup>5</sup>

<sup>1</sup> *Williams v. Barton*, 13 La. 404; *Jones v. George*, 61 Tex. 345, 354, 48 Am. Rep. 280; *Howe v. North*, 69 Mich. 272, 281, 37 N. W. Rep. 213.

<sup>2</sup> *Rhodes v. Baird*, 16 Ohio St. 581; *Brayton v. Chase*, 3 Wis. 456; *Bridges v. Stickney*, 38 Me. 361; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. 536, 12 S. W. Rep. 454, 13 id. 249, 7 L. R. A. 77; *Meyer v. Haven*, *supra*.

<sup>3</sup> *Wilson v. Dunville*, 6 L. R. Ire. 210; *Hamilton v. Magill*, 12 id. 186, 202.

<sup>4</sup> *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. Rep. 751, quoting the text.

<sup>5</sup> *Hadley v. Baxendale*, 9 Ex. 341; *Candee v. Western U. Tel. Co.*, 34 Wis. 479, 17 Am. Rep. 452; *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co.*, 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. Rep. 827; *Jones v. Nathrop*, 7 Colo. 1, 1 Pac. Rep. 435; *Smith v. Osborn*, 143 Mass. 185, 9 N. E. Rep. 558; *Froheich v. Gammon*, 28 Minn. 476, 11 N. W. Rep. 88; *Western U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577; *Detroit White Lead Works v. Knaszak*, 13 N. Y. Misc. 619, 34 N. Y. Supp. 924; *Simpson Brick-Press Co. v.*

Those damages which arise upon the direct, necessary and immediate effects are always recoverable, because every person is supposed to foresee and intend the direct and natural re-

Marshall, 5 S. D. 528, 59 N. W. Rep. 728, citing the text; Guetzkow v. Andrews, 92 Wis. 214, 66 N. W. Rep. 119, 53 Am. St. 909; Dwyer v. Administrators, 47 La. Ann. 1232, 17 So. Rep. 796; Carnegie v. Holt, 99 Mich. 606, 58 N. W. Rep. 623; North v. Johnson, 58 Minn. 242, 59 N. W. Rep. 1012; Sloggy v. Crescent Creamery Co., 72 Minn. 316, 75 N. W. Rep. 225; McConaghy v. Pemberton, 168 Pa. 121, 31 Atl. Rep. 996; Rockefeller v. Merritt, 22 C. C. A. 617, 76 Fed. Rep. 909, 35 L. R. A. 633; Central Trust Co. v. Clark, 34 C. C. A. 354, 93 Fed. Rep. 293; Krebs Manuf. Co. v. Brown, 108 Ala. 508, 18 So. Rep. 659, 54 Am. St. 188; Slaughter v. Denmead, 88 Va. 1019, 14 S. E. Rep. 833; Skirm v. Hilliker, 66 N. J. L. 410, 49 Atl. Rep. 679; Witherbee v. Meyer, 155 N. Y. 449, 50 N. E. Rep. 58; De Ford v. Maryland Steel Co., 113 Fed. Rep. 72, 51 C. C. A. 59.

The rule was very strictly applied in a case in which it was held that the vendor of diseased sheep who sold them without knowledge of their condition was not responsible for damages resulting to the vendee from their being placed with cattle, the vendor not being informed that this would be done. Weaver v. Penny, 17 Ill. App. 628. The last reason given is of doubtful cogency. See Packard v. Slack, 33 Vt. 9; Smith v. Green, 1 C. P. Div. 92, where it is said that one who sells diseased sheep may be charged with knowledge that the purchaser intends, or is almost certain, to put them with other sheep. See, also, ch. 14.

An employee who quits the service of his employer in violation of his contract is not liable for the loss of property following his act through

the inability of the master to procure other help. Riech v. Bolch, 68 Iowa, 526, 27 N. W. Rep. 507.

A carrier who has not contracted to transport cattle received from a connecting carrier in the cars in which they came to his care and who has no notice that they are of a kind which it is unlawful to unload in the state in which they are received is not liable to the shipper because they were seized and sold to pay a fine for such unloading, although the shipper protested against it. McAlister v. Chicago, etc. R. Co., 74 Mo. 351.

Barges were not returned to their owner at the time agreed, and on account of the delay were swept from their moorings by an extraordinary ice gorge and lost. "All that the defendants could foresee by ordinary forecast as a result of the breach of their contract to return the boats would be the expense to the plaintiff in taking them himself. They are liable for damages, the primary and immediate result of the breach of their contract, and not for those which arise from a conjunction of this fault with other circumstances that are of an extraordinary nature." Jones v. Gilmore, 91 Pa. 310. See Parmalee v. Wilks, 22 Barb. 539, stated in § 87.

For the breach of a contract to repair a tool, the loss of the material on hand when it ought to have been repaired may be recovered for; but not the profits which might have been made by working up such material with the tool, they being unusual, considering the value of the implement, and notice not having been given him who was to repair it. Sitton v. Macdonald, 25 S. C. 68.

The immediate result of the breach

sults of his acts; those which ensue in the ordinary course of things, considering the particular nature and subject-matter

of a contract not to engage in the hotel business within the limits of a designated city during the time the plaintiff was the proprietor of a certain hotel therein, the agreement being part of the consideration for its purchase, is the diversion of patronage therefrom; depreciation in the value of the hotel property is secondary; this last cannot be recovered for unless specially claimed. *Lashus v. Chamberlain*, 5 Utah, 140, 13 Pac. Rep. 361. Compare *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 51 Am. Rep. 842, in which it was held that one who purchased the real estate, personal property, firm name and good-will of a partnership business might prove as an element of his damage the value of the property with and without the good-will and trade-mark, and the difference in such value might, in the absence of more specific proof, be taken as the measure of damages. The Utah court remark of this case that it appears to stand alone.

The code of Georgia, expressing the rule deduced from the decisions of the court therein (*Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 417, 65 Am. Dec. 602; *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *Red v. Augusta*, 25 Ga. 386), provides that "remote or consequential damages are not allowed, unless they can be traced solely to the breach of the contract or are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract." Sec. 2944. Under this provision it has been held that the purchaser of a saw-mill and outfit cannot recover against his vendor, who furnished machinery of

a quality inferior to that called for by the contract, damages sustained from abandoning the business in which he had been engaged and in getting ready to use the mill, improvements made to carry on the business of running the mill, loss of profits, purchase of material, payments made for help, nor for his personal services. The measure of his damages was the difference between the value of the machinery contracted for and the value of that in fact delivered at the time of delivery, or such difference as ascertained by a resale within a reasonable time thereafter. *Willingham v. Hooven*, 74 Ga. 233, 248, 58 Am. Rep. 435.

Damages from injury to grain because of the failure of a warranted machine to work to the capacity specified, and which was sold with the understanding that it was to be used in securing a large crop, were held not recoverable; they could not be fairly considered such as would naturally arise from the breach of the contract or to have been contemplated by the parties as a probable result. *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. Rep. 153; *Osborne v. Poket*, 33 Minn. 10, 21 N. W. Rep. 752; *Brayton v. Chase*, 3 Wis. 456. These cases carry the rule to the extreme. The Wisconsin case is probably overruled by cases referred to in *Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co.*, 62 Wis. 642, 650, 22 N. W. Rep. 827, 51 Am. Rep. 725. *Contra*, *Smeed v. Foord*, 1 E. & E. 602. See ch. 14.

The breach of a contract to furnish articles to be used in completing a building does not make the contractor liable for the loss of the rent, no extrinsic facts being alleged. *Liljengren Furniture & L. Co. v. Mead*, 42 Minn. 420, 44 N. W. Rep. 806.

of the contract.<sup>1</sup> It is conclusively presumed that a party violating his contract contemplates the damages which directly ensue from the breach.<sup>2</sup> There are fixed rules for measuring [75] damages of a pecuniary nature, which apply to all persons

Though the breach of a contract to furnish guards for the shops and work-houses in a prison enables an incendiary to set fire to the building, and the loss resulting is the direct and immediate consequence of the fire, it was not, in legal contemplation, of the failure to provide a watch. *Tennessee v. Ward*, 9 Heisk. 100, 133. This ruling is open to question. The agreement to maintain a guard, considered as a precaution contracted for to insure the safety of the plaintiff's property, was such as was apparently intended to prevent, among other things, the loss which occurred, and hence that loss may properly be considered as within the contemplation of the parties when they contracted as a consequence of a breach. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. 536, 12 S. W. Rep. 554, 13 id. 249, 7 L. R. A. 77.

A warehouseman who agrees to store goods at a particular place is liable to the bailor for the loss of those intrusted to him and which are stored in another place and destroyed by fire, the latter having insured them at the place where the contract provided they were to be stored. If the destruction of the goods must have inevitably taken place in the event they had been stored as agreed, the bailee might have been released. *Lilley v. Double-day*, 7 Q. B. Div. 510.

A warehouseman who neglects to ship one bale of cotton out of a larger quantity is not liable for the cost of insurance for one day on the whole lot nor for the interest on money which was borrowed because of his refusal to so do, no notice hav-

ing been given him of the liability of the owner for these expenses. *Swift v. Eastern Warehouse Co.*, 86 Ala. 294, 5 So. Rep. 505.

<sup>1</sup> *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Hadley v. Baxendale*, 9 Ex. 341.

One who agrees to procure an assignment of a mortgage being foreclosed and then to forbear for a specified time to enable the promisee to enforce it, and who, after procuring such assignment, sells it to one who immediately proceeds to a sale and thereby extinguishes the promisee's interest in the mortgaged premises before the expiration of the agreed period of forbearance, is liable for the net value of the promisee's interest. *Gallup v. Miller*, 25 Hun. 298.

<sup>2</sup> Whether the parties who entered into a contract had in mind the damages which might follow its breach or not does not in the least vary the question of their liability or the measure of recovery, under ordinary circumstances; this is governed by the injury proximately resulting. *Collins v. Stephens*, 58 Ala. 543; *Dougherty v. American U. Tel. Co.*, 75 Ala. 168, 177, 51 Am. Rep. 435; *Cohn v. Norton*, 57 Conn. 480, 492, 5 L. R. A. 572, 18 Atl. Rep. 595; *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. Rep. 525; *Farmers' Loan & Trust Co. v. Eaton*, 114 Fed. Rep. 14, 51 C. C. A. 640; *Eckington & S. H. R. Co. v. McDevitt*, 18 D. C. App. Cas. 497.

A railroad company which violates its contract to fence its track laid through a farm is supposed to have contemplated that animals on the farm would be exposed to injury

without regard to their actual foresight of the particular elements. And this is also true of the direct damages from torts.<sup>1</sup>

§ 46. **Illustrations of liability under the rule.** In an action to recover damages for the breach of a contract to harvest oats, where the petition stated that by reason of such breach the oats were entirely lost, the verdict given for their value was retained, the court having refused to instruct the jury that they were to be guided by the general rule of damages, namely, the difference between the contract price and what the labor would have cost, and having instructed that the plaintiff was entitled to recover the value if he took all reasonable precaution to prevent such loss.<sup>2</sup> Where<sup>3</sup> a party contracted with a manufacturer of bar iron to furnish pig iron in prescribed quantities at specified times, and made default, in consequence of which the manufacturer was obliged to get and use an inferior quality of iron in order to carry on his business, and thereby suffered loss with his customers, it was said: "When the vendor fails to comply with his contract the general rule for the measure of damages undoubtedly is the difference between the contract and the market price of the article at the time of the breach."<sup>4</sup> This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself the rule does not apply, for the reason of it ceases.<sup>5</sup> . . . If an article of the same quality cannot be procured in the market its market price cannot be ascertained and we are without the necessary *data* for the application of the general rule. This is

from its trains; that damage would be done by trespassing animals and pasturage injured. Louisville, etc. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. Rep. 404; Same v. Power, 119 Ind. 269, 21 N. E. Rep. 751; Lake Erie & W. R. Co. v. Power, 15 Ind. App. 179, 43 N. E. Rep. 959.

<sup>1</sup> Eten v. Luyster, 60 N. Y. 252; Lowenstein v. Chappell, 30 Barb. 241; Horner v. Wood, 16 Barb. 339; § 13.

<sup>2</sup> Houser v. Pearce, 13 Kan. 104. See Prosser v. Jones, 41 Iowa, 674.

The text is cited in Anderson Electric Co. v. Cleburne Water, Ice & L. Co., 23 Tex. Civ. App. 328, 337, 57 S. W. Rep. 575.

<sup>3</sup> McHose v. Fulmer, 73 Pa. 365.

<sup>4</sup> Browning v. Simons, 17 Ind. App. 45, 46 N. E. Rep. 86, citing the text.

<sup>5</sup> Bank of Montgomery v. Reese, 26 Pa. 143; Laporte Imp. Co. v. Brock, 99 Iowa, 485, 61 Am. St. 245, 68 N. W. Rep. 810, citing the text; Chalice v. Witte, 81 Mo. App. 84, also citing the text.

a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture by having to use [76] an inferior article, or not receiving the advance on his contract price upon any contracts which he himself had made in reliance upon the fulfillment of the contract by the vendor. We do not mean to say that if he undertakes to fill his own contracts with an inferior article, and, in consequence, such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfillment of the contract."

The rule under consideration was comprehensively stated in an early case.<sup>1</sup> In general the delinquent party is holden to make good the loss occasioned by his delinquency. His liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed. It was agreed between the owner of a rice mill and a planter that if the latter would bring his rice to the former's mill it should have priority in being beaten. Rice so brought was not so beaten, but was kept to await another turn, and before it was beaten the mill and the rice were consumed by an accidental fire. It was held that damages for the loss could not be assessed as the consequence of the breach of the contract.<sup>2</sup> The damages for a breach of contract must be such as the party suffers in respect to the particular thing which is the subject of the contract, and not such as has been accidentally occasioned or supposed to be occasioned in his business or affairs.<sup>3</sup> The defendant agreed

<sup>1</sup> *Miller v. Mariner's Church*, 7 Me. 55, 20 Am. Dec. 341.      72 Am. Dec. 552. *Contra*, *Lilley v. Doubleday*, 7 Q. B. Div. 510.

<sup>2</sup> *Ashe v. De Rossett*, 5 Jones, 299,      <sup>3</sup> *Batchelder v. Sturgis*, 3 Cush. 201;

to rent to the plaintiff a store for a year, to commence some weeks in the future. Relying upon this agreement the plaintiff sold his lease of a store he then occupied to M., agreeing to give possession about the time he would be entitled to [77] occupy the store rented of the defendant, M. allowing the plaintiff to occupy a part of the store in the meantime. The defendant refused to give the lease in accordance with his agreement. The plaintiff's goods were packed by him to put them in the space they were permitted to occupy in M.'s store, and suffered some damage therefrom. It was held that this damage was not the result of the defendant's breach of contract; nor was he entitled to interest on the value of his stock of goods, which, by the defendant's refusal to fulfill his contract, the plaintiff had been obliged to keep elsewhere, and was prevented from exposing for sale for the period of fifteen days, as the defendant's act did not necessarily prevent a sale of the stock for that length of time.<sup>1</sup> In a similar case the lessor was not liable to the lessee for money paid for clerk hire nor for losses resulting from the purchase of goods. While the former may have supposed that the latter would make preparations to occupy the store he could not know what it would be necessary for him to do.<sup>2</sup> One merchant agreed with another that he would not enter judgment on a bond given him except on a contingency named. The contract was violated, and as a result the fact that judgment was entered was published in a commercial journal known as the "Black List," with the effect of injuring the plaintiff's credit. Such publication was an event the parties could have foreseen.<sup>3</sup>

A case of first impression came before one of the appellate courts of Illinois not long since. The vendor of a safe war-

Hayden v. Cabot, 17 Mass. 169; State v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Webster v. Woolford, 81 Md. 329, 32 Atl. Rep. 319; Clark v. Moore, 3 Mich. 55; Johnson v. Matthews, 5 Kan. 118; Doud v. Duluth Milling Co., 55 Minn. 53, 56 N. W. Rep. 463; Florida Central & P. R. Co. v. Bucki, 16 C. C. A. 42, 68 Fed. Rep. 864.

<sup>1</sup> Lowenstein v. Chappell, 30 Barb. 241.

<sup>2</sup> Cohn v. Norton, 57 Conn. 480, 492, 5 L. R. A. 572, 18 Atl. Rep. 595; Friedland v. Myers, 139 N. Y. 432, 34 N. E. Rep. 1058.

Loss of profits is too remote to be considered where there is a breach of such a contract. Alexander v. Bishop, 59 Iowa, 572, 13 N. W. Rep. 714.

<sup>3</sup> Blair v. Kinch, 10 L. R. Ire. 234.

ranted it to be burglar proof if directions given for locking it were observed; these were incomplete and the safe was opened by burglars without the use of force, and money therein was taken. It was said in the opinion: It seems to be no undue stretch of the well-established rule that if the damages suffered be such as may reasonably be supposed to have been in the contemplation of both parties at the time of the contract as the probable result of its breach, to hold that the very intervention of the burglar was the essential element that both parties contemplated as being the thing to be guarded against, and concerning which the warranty was interposed. If so, then the consequence that followed was the natural and proximate result of the breach, and the recovery was right.<sup>1</sup> A vendor of powder broke his contract to furnish the plaintiff with the papers necessary to lawfully land the powder, knowing that the failure to do so would make plaintiff liable for the violation of law in attempting to import an interdicted article. The defendant was liable for the fine paid by the plaintiff.<sup>2</sup> A corporation which deducts a part of the wages of an employee to pay a physician employed under a contract to provide competent medical service to him and his family is liable for the death of the child of the employee caused by the breach of the contract.<sup>3</sup> Where there was a delay of four months in delivering a wheel and pinion to a street railway company, in consequence of which its earning power was largely reduced, the defendant, not having been apprised of the facts, was not liable for the losses.<sup>4</sup> The breach of a contract between two railroad companies which confers a license upon one of them to run its trains over the track of the other does not make the party guilty thereof liable to the other for damage sustained to property which it was unable to carry because of such violation and which it was obliged to unload from its cars at a place

<sup>1</sup> Deane v. Michigan Stove Co., 69 Ill. App. 106.

<sup>2</sup> Hecla Powder Co. v. Sigua Iron Co., 157 N. Y. 437, 52 N. E. Rep. 650.

<sup>3</sup> American Tin-Plate Co. v. Guy, 25 Ind. App. 558, 58 N. E. Rep. 738, following Wabash R. Co. v. Kelly, 153 Ind. 119, 25 N. E. Rep. 152, hold-

ing an employer liable to an employee for the malpractice of its hospital surgeon, money being deducted from the wages of employees for the support of the hospital.

<sup>4</sup> Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. Rep. 293.



where it was exposed to rain and mud.<sup>1</sup> The damages resulting from the foreclosure of a mortgage are not proximately caused by the breach of a contract to loan the mortgagor money.<sup>2</sup> The lessor of personalty must deliver it in a condition for its safe use by the lessee; failing to do so, he is liable for any damages resulting from defects therein.<sup>3</sup> It is the proximate cause of the refusal of the purchaser of shares of stock to accept the same that the vendor shall become liable for assessments thereon.<sup>4</sup> If poor seed is sold in lieu of good, a crop of inferior quality and of less value is the natural result.<sup>5</sup>

Where the defendant contracted to make and deliver dies to be used in the manufacture of lanterns, in which business the plaintiff's assignor proposed to engage when, so far as appeared, the dies were furnished, it was not contemplated that he would rent premises and employ men in preparation for carrying on the business to be established; the natural and obvious consequence of the breach would be to compel him to obtain dies elsewhere; the assignee of the contract, of whose connection with it defendant had no notice, could only recover such damages as were contemplated when the contract was made.<sup>6</sup> Pursuant to a contract of bailment the defendant delivered to the plaintiff, without warranty, seed which he believed to be clean, which was to be sown on the plaintiff's land, the produce thereof to be returned and delivered to and paid for by the defendant at a fixed price. Such seed was not pure, and the plants grown from the foreign seed, having become scattered on the ground during the harvesting, came up the following year. The damage thus caused was too remote.<sup>7</sup>

<sup>1</sup> *Railway Co. v. Neel*, 56 Ark. 279, 19 S. W. Rep. 963.

<sup>2</sup> *Savings Bank v. Asbury*, 117 Cal. 96, 48 Pac. Rep. 1081.

<sup>3</sup> *Moriarty v. Porter*, 22 N. Y. Misc. 536, 49 N. Y. Supp. 1107.

<sup>4</sup> *Gay v. Dare*, 103 Cal. 454, 37 Pac. Rep. 466.

<sup>5</sup> *Hoopes v. East*, 19 Tex. Civ. App. 53, 48 S. W. Rep. 764.

<sup>6</sup> *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209, 31 N. E. Rep. 1018.

<sup>7</sup> *Stewart v. Sculthorp*, 25 Ont. 544.

But in *McMullen v. Free*, 13 Ont. 57, the vendor of seed grain, which was impure by reason of the presence of the seed of noxious weeds, was held liable to a farmer to whom he sold such seed for the damage done to his farm by reason of the growth of such weeds, though the crop raised from the seed of the grain was not injured. See § 670 *et seq.*

But it is otherwise where there is a breach by a landlord of his contract to furnish his tenant with fertilizer.<sup>1</sup>

§ 47. **Liability not affected by collateral ventures.** Parties, when they enter into contracts, may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance; but they are not supposed to know the condition of each other's affairs, nor to take into consideration any existing or contemplated transactions, not communicated nor known, with other persons.<sup>2</sup> Few persons would enter into contracts of any considerable extent as to subject-matter or time if they should thereby incidentally assume the responsibility of carrying out, or be held legally affected by, other arrangements over which they have no control and the existence of which are unknown to them. In awarding damages for the non-performance of an existing contract the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract, and of which no notice has been given the other party, cannot be included. In an action for breach of a warranty of a horse the plaintiff cannot recover as special damage the loss of a bargain for its resale at a profit, though the contract for such resale had actually been completed before the unsoundness was discovered.<sup>3</sup>

<sup>1</sup>Herring v. Armwood, 130 N. C. 177, 41 S. E. Rep. 96.

<sup>2</sup>Horne v. Wood, 16 Barb. 386; Cuddy v. Major, 12 Mich. 368; Masterton v. Mayor, 7 Hill, 61; Story v. New York R. Co., 6 N. Y. 85; Bridges v. Stickney, 38 Me. 361; Barnard v. Poor, 21 Pick. 378; Fox v. Harding, 7 Cush. 516; Brauer v. Oceanic Steam Navigation Co., 34 N. Y. Misc. 127, 69 N. Y. Supp. 465; Hay v. Williams, 8 Ky. L. Rep. 434 (Ky. Super. Ct.).

<sup>3</sup>Clare v. Maynard, 6 Ad. & El. 519; Walker v. Moore, 10 B. & C. 416; Lawrence v. Wardwell, 6 Barb. 423; Williams v. Reynolds, 6 B. & S. 495; Harper v. Miller, 27 Ind. 277; Jones v. National Printing Co., 13 Daly, 92; Detroit White Lead Works v. Knazak, 13 N. Y. Misc. 619, 34 N. Y.

Supp. 924; Scaramanga v. English, 1 Commercial Cas. 99; Brauer v. Oceanic Steam Navigation Co., 66 App. Div. 605, 73 N. Y. Supp. 291; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. Rep. 58; Dean Pump Works v. Astoria Iron Works, 40 Ore. 83, 66 Pac. Rep. 605.

The text is quoted with approval in Mitchell v. Clarke, 71 Cal. 163, 11 Pac. Rep. 882, 60 Am. Rep. 529, which was an action for the breach of a contract to pay the plaintiff's creditor a sum of money intrusted to the defendant for that purpose. Damages resulting to the plaintiff by reason of his creditor's attaching and selling his property were not such as were the natural consequence of the breach. To the same effect

**§ 48. Distinction between consequential liability in tort and on contract.** The distinction between the liability for [78] consequential damages resulting from a tort and the damages recoverable for a breach of contract is forcibly illustrated by comparing an English case<sup>1</sup> with two Wisconsin cases.<sup>2</sup> In the first case a carrier negligently induced the plaintiff and his wife and child to leave the train in the night at a wrong station; no conveyance could be had, and they were obliged to take a long walk through the rain to reach their destination. In consequence of the exposure and fatigue the wife was taken sick. The action to recover damages was considered as being brought on the contract for carriage, and they were held too remote. In the earlier of the Wisconsin cases the action was upon a contract to convey the plaintiff and about eighty others from one station to a given place and back on a named day by a special train, which was to leave on the return trip at a stated hour. It was alleged that they were conveyed to the place designated, but no cars were furnished to convey them back, and the breach was charged to be wilful and fraudulent; that by reason thereof the plaintiff was greatly injured in bodily health, suffered great pain and anxiety of mind, lost much time from business and was subjected to indignities and insults from employees of the carrier. It was held, the action being upon contract, that the trial court erred in charging that, if the defendant's conduct was wilful and malicious, the jury might award full compensatory, though not punitive, damages, "embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong as the jury might find was the immediate result of the defendant's misconduct, and must necessarily and reason-

are *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. Rep. 46, 60 Am. Rep. 534; *Cohn v. Norton*, 57 Conn. 480, 493, 18 Atl. Rep. 595; *Wetmore v. Pattison*, 45 Mich. 439, 8 N. W. Rep. 67; *Hunt v. Oregon Pacific R. Co.*, 36 Fed. Rep. 481; *Illinois Central R. Co. v. United States*, 16 Ct. of Cls. 312, 334; *Cates v. Sparkman*, 73 Tex. 619, 11 S. W. Rep. 846; *Houston, etc. R. Co. v. Hill*, 63 Tex. 384, 51 Am. Rep. 642.

<sup>1</sup> *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111.

<sup>2</sup> *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Brown v. Same*, 54 Wis. 342, 11 N. W. Rep. 356, 911. The *Walsh* case is cited approvingly in *North German Lloyd Steamship Co. v. Wood*, 18 Pa. Super. Ct. 488, 493.

ably have been expected to arise therefrom to the plaintiff." Such damages were held too remote; they could not have been in contemplation when the contract was made. The court quoted and adopted the reasoning of the several judges in the English case. The other Wisconsin case was an action for [79] negligence, and the facts were nearly like those in the Hobbs case. Recovery was allowed for the sickness caused by the necessary walk of the female plaintiff to her destination.<sup>1</sup>

**§ 49. Same subject; criticism of the Hobbs case.** The doctrine of the Hobbs case which is stated in the preceding section made some impression upon the law in similar cases in a few states; its influence is most seen in cases ruled soon after the opinions of the judges who decided it were received in this country.<sup>2</sup> As has been stated elsewhere<sup>3</sup> the tendency of American authority is in opposition to the view promulgated therein.<sup>4</sup> In addition to the cases cited in the previous discussion attention is directed to a Texas decision in which the English case and those which have followed it are said to be rested upon too narrow ground,<sup>5</sup> and which holds that a railway company which has violated its contract by carrying a passenger beyond his destination is liable to him for the discomfort, inconvenience, sickness, expenses, costs and charges which are the direct, natural and proximate result. The Hobbs case stands but little better in England than it does in this country; indeed, it is practically overruled there. The court of appeal, queen's bench division, has unanimously held that it is a probable result of turning horses which have been transported on a railway out of a stable in which it had been contracted that they should

<sup>1</sup> This case has been discussed in § 36, where other cases on the subject are collected.

<sup>2</sup> See *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

<sup>3</sup> § 36.

<sup>4</sup> Massachusetts may be an exception to the rule, it being held there that in an action for the breach of a contract to carry on a railroad there

is no connection between the agreement and the arrest of the passenger by the conductor of the train, who was a police officer, and who wrongfully refused to receive the ticket tendered, and delivered the passenger to another police officer by whom he was confined in a cell with the result that illness followed. *Murdock v. Boston & A. R. Co.*, 133 Mass. 15.

<sup>5</sup> *I. & G. N. R. Co. v. Terry*, 62 Tex. 380.

be sheltered that some of them would take cold while their owner was finding room for them elsewhere, and that damages resulting might be recovered.<sup>1</sup> In the case last cited Bramwell, L. J., said, referring to the Hobbs case, "I do not see why a passenger who, by default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur." Brett, L. J., observed, "Why was the damage to the wife too remote? There was no accommodation or conveyance to be obtained where the parties were put off the train, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman and then turned her out in the middle of the night with only her night clothes on, would it not be a natural consequence that she would take a cold? . . . It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one. People do not get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting out of a train under such circumstances as in the Hobbs case should catch cold as that horses turned out as these were in this case should suffer. There is, therefore, a difference, though I own I do not see much between this case and that." The question has also been passed upon in Canada, and the view there taken is rested on a basis which is entirely satisfactory. In that case a passenger was ejected from a street car after an altercation with the conductor which put him in a state of perspiration; he took cold and suffered from rheumatism and bronchitis. The defendant contended that the right interfered with was one of contract, and that, as the illness was not reasonably contemplated at the time the contract was made, there was no liability on account of it. The recovery of damages on account of the illness was sustained by the divisional court and the court of appeal. It was said in the opinion of the supreme court that when one, whether in performance of a contract or not, takes charge of

<sup>1</sup> McMahon v. Field, 7 Q. B. Div. 591.

the person or property of another, there arises a duty of reasonable care; and if by his own act he creates circumstances of danger and subjects the person or property to risk without exercising reasonable care to guard against injury or damage, he is responsible for such injury and damage as arises as the direct or natural and probable consequence of the wrongful act. The writer of the opinion shared in the doubts expressed by the court of appeal in England respecting the conclusiveness of the reasoning in the *Hobbs* case, but thought the case in hand was independent of it. A dissenting judge approved of the *Hobbs* case, and thought it governed the one before the court.<sup>1</sup>

§ 50. **Liability under special circumstances; *Hadley v. Baxendale*.** The leading English case<sup>2</sup> on the scope of recovery for the breach of a contract established two propositions which have been very generally accepted: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract."<sup>3</sup> The first of these rules has been consid-

<sup>1</sup> *Toronto R. Co. v. Grinsted*, 24 Can. Sup. Ct. 570.

<sup>2</sup> *Hadley v. Baxendale*, 9 Ex. 353.

<sup>3</sup> *Griffin v. Colver*, 16 N. Y. 489; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209, 31 N.

ered in the preceding sections. It is to be remembered that there is no relaxation of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed, the same strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract would derive from its performance is the measure of his damages if it be broken.<sup>1</sup> It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to them. If it appear by such circumstances that the contract was entered into, [80] and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure special gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are consequential and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated.<sup>2</sup> If all such facts as are admissible to jus-

E. Rep. 1018. Criticisms upon the language used in the extract quoted in the text have been made by various judges and writers; but the principles enunciated therein have received general approval. Occasionally a judge intimates that the conditions of business have so changed since that case was decided that it is no longer applicable in its entirety. See *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 178, 51 Am. Rep. 435.

<sup>1</sup> *Alder v. Keighley*, 15 M. & W. 117; *Guetzkow v. Andrews*, 92 Wis. 214, 66 N. W. Rep. 119, 53 Am. St. 909; *Blagen v. Thompson*, 23 Oreg. 239, 31 Pac. Rep. 647, 18 L. R. A. 315.

<sup>2</sup> *Machine Co. v. Compress Co.*, 105 Tenn. 187, 204, 58 S. W. Rep. 270, quoting the text.

In *Fox v. Everson*, 27 Hun, 335, the defendant sold the plaintiff clover seed with which was mixed plaintiff seed. A recovery was allowed for the difference between the value of

tify the proof of consequential damages were recited in the contract as the law connects them with it when known, or if the legal obligation which the law imposes by reason of them had been expressed in words by the parties, such damages would be direct and not consequential.

In a case in Wisconsin the plaintiff was a butcher, and the defendant agreed to furnish him with what ice he might require for a season, knowing that the plaintiff needed it to preserve fresh meat. About the last of July the defendant stopped supplying ice and refused to furnish any more, in consequence of which plaintiff lost considerable meat. This loss the plaintiff recovered. The court say: "As the defendant was acquainted with all the special circumstances in respect to this contract—knew for what purpose the ice agreed to be furnished by him was to be used,—he should fully indemnify the plaintiff for the loss he sustained by the non-delivery of the ice; and he was therefore justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere."<sup>1</sup> This case was not one of simple con-

pure seed and that actually sown and for the depreciation in value of the farm on account of the plaintiff seed. It was contended that there was no liability for the last item because it was not proven that the defendant knew the seed was bought for the purpose of being sown. The contention was overruled because that is the purpose for which such seed is usually purchased. But the vendor was not apprised of the fact that the seed sold was to be mixed with timothy seed, and hence was not liable for the loss of the latter.

<sup>1</sup> Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. Rep. 1129. See Manning v. Fitch, 138 Mass. 273; Beeman v. Banta, 118 N. Y. 538, 16 Am. St. 779, 23 N. E. Rep. 887.

The text is cited in New Orleans & N. E. R. Co. v. Meridian Water-works Co., 18 C. C. A. 519, 72 Fed. Rep. 227, where it was alleged that the de-

fendant had failed to perform its contract to furnish at the plaintiff's shops the required pressure of water, which it had contracted to furnish for all purposes for which it might be desired or used; that one of such purposes was the extinguishment of fires in the plaintiff's shops, of which the defendant had knowledge; that at the time the fire which burned the shops broke out there was less than half the required pressure, and that, in consequence, the shops were burned. A good cause of action was stated.

In Jones v. George, 61 Tex. 345, 48 Am. Rep. 280 (see S. C., 56 Tex. 149, 42 Am. Rep. 689), the plaintiff applied to the defendant, a druggist, for a quantity of Paris green; by mistake he was supplied with chrome green, a substance similar in appearance but not possessing the same properties. The vendor knew that the article called for was desired to



tract of sale. The special circumstances, known to both [81] parties, made it more than that in its aims and consequences, although the terms in which it was made, considered alone, imported only a contract of sale. The vendor, knowing the purpose for which the ice was wanted, was held, by implication, to undertake to deliver it as agreed in order that the vendee should not suffer loss on his fresh meat from his inability to preserve it for want of ice. Such being the contract, the loss which occurred from its breach was the direct consequence thereof. It is to be observed that the implication from the vendor's knowledge of the special circumstances required performance of no additional act to fulfill the contract. It merely enjoined on him the duty to perform it in view of more serious consequences than those which usually follow a vendor's default. The principle that the injured party is entitled to compensation proportioned to the actual injury is paramount, and overrides any rule not adapted to measure compensation in such a special case. The vendor is thus admonished that if he fails to deliver the property as agreed he cannot satisfy the injury to the vendee by paying the difference of a higher market price unless the article can be obtained in

prevent the destruction of the plaintiff's cotton crop by the cotton worm, which had for years been very destructive. Without knowing the mistake the chrome green was applied to the cotton, and failed to produce the desired result. Evidence was given to show that Paris green would have had a beneficial effect. It was ruled that there was not a technical warranty that Paris green was delivered, but an implied contract that such was the fact. In answer to the contention that it is not enough to entitle a party to recover damages for breach of contract to show that without the breach relied on the injury would not have been received when it results from an unforeseen or unexpected cause, or from a cause which no reasonable human exertion could counteract, the court observed, "but if it ap-

pears that the contract was made for the express purpose of avoiding a loss likely to occur from a known natural cause, which could be controlled and avoided; that this was known to the contracting parties, and that compliance with the contract would have prevented the injury by destroying the thing which immediately inflicts it, then it is believed that the breach of such a contract must be said, within the meaning of the law, to be the direct cause of the injury. In such case there is 'an immediate and natural relation between the act complained of and the injury without the intervention of other and independent cause;' for a cause which is subject to control and contemplated by the parties to a contract, looking to its avoidance or control, cannot be said to be an 'independent cause.'"

market; that the loss will be the value of the property which the ice was needed to preserve.<sup>1</sup> Where a vendor broke his contract to supply ice to a local dealer for the entire season at a fixed price, the latter was entitled to recover the increased price he was obliged to pay for ice bought from other parties, and for the loss of profits which he would have realized from his business from the time he was compelled to suspend the same because of inability to procure ice from any source.<sup>2</sup>

**§ 51. Same subject; illustrations and discussion of the rule.** In a case<sup>3</sup> in which the plaintiff had contracted to sell a large quantity of bullets of a certain quality and at a fixed price, he made a contract with the defendant by which the latter agreed to manufacture and deliver to him the same quantity and quality of bullets; at the time of making it he informed the defendant of his arrangement and that he was contracting with him for the bullets in order to fulfill that agreement. The contract between these parties was in writing, but did not contain any allusion to the special object of making it. It was held, notwithstanding, that it was competent to prove such antecedent contract and parol proof was admissible to establish that the defendant was informed that [82] the plaintiff made the contract in question with a view to performing the other; and that the proper measure of damages was the difference between the price at which the defendant was to furnish the bullets and that the plaintiff was to receive. It appeared that the market price advanced so that the bullets could not be obtained below the latter price; the market price was considerably higher, but the recovery was

<sup>1</sup> The contract in suit provided that the manufacturer should furnish, deliver and put in running order by a specified day machinery for a cotton-seed oil mill. By reason of a breach a quantity of seed purchased for grinding was damaged. Parol evidence was received to show that time was of the essence of the contract, and that the purchase of seed in advance of the period fixed for the completion of the mill was within the contemplation of the parties. *Van Winkle v. Wilkins*, 81 Ga. 93, 12

*Am. St.* 299, 7 S. E. Rep. 644; *Dennis v. Stoughton*, 55 Vt. 371; *Goodloe v. Rogers*, 10 La. Ann. 631; *Lobdell v. Parker*, 3 La. 328. Compare *Brayton v. Chase*, 3 Wis. 456, which is inconsistent with *Hammer v. Schoenfelder*, 47 id. 455, 2 N. W. Rep. 1129, stated *supra*.

<sup>2</sup> *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219, 62 S. W. Rep. 591.

<sup>3</sup> *Messmore v. New York Shot & L. Co.*, 40 N. Y. 422.

limited as above stated, for that gave the plaintiff compensation for his actual loss, and that was the loss which was in contemplation by the parties when the contract was made. Where the contract relates to commodities commonly purchasable in the market the purchaser is made whole when he recovers the difference between the contract price and the value of the article in the market at the time and place of delivery, because he can supply himself with this article by going into market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this was within the contemplation of the parties when they contracted. If, however, the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such a contract, the profits on such resale are those contemplated by the parties. In other words, on the ordinary contract of sale the damages contemplated are those which would result with reference to market value if the subject of the contract have such a value; otherwise, on the basis of its actual value, as it may be ascertained by proof or for the use to which the property is commonly applied, whether known or not.<sup>1</sup> But if the contract of purchase is made with a view to a known resale already contracted or any known special use, the damages which are contemplated to result from the vendor's breach are those which would naturally follow on the basis of the contract for resale or other special use, known to the vendor when the contract was made. The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the making of it.<sup>2</sup>

<sup>1</sup> Rhodes v. Baird, 16 Ohio St. 573; v. New York, etc. Tel. Co., 41 N. Y. Borries v. Hutchinson, 18 C. B. (N. 544, 1 Am. Rep. 446; Hexter v. Knox, S.) 465. 63 N. Y. 561; True v. International

<sup>2</sup> Davis v. Talcott, 14 Barb. 611; Tel. Co., 60 Me. 9; Fletcher v. Taylor, 17 C. B. 21; Squire v. Western U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Cory v. Thames Iron Works Co., L. R. 3 Q. B. 181; Borradaile v. Brunton, 8 Taunt. 535; In re Trent & H. Co., L. R. 6 Eq. 396; Dobbins v. Duguid, 65 Ill. 464; Richardson v. Chy-

Cobb v. I. C. R. Co., 38 Iowa, 601; Haven v. Wakefield, 39 Ill. 509; Illinois Central R. Co. v. Cobb, 64 Ill. 128; Winne v. Kelley, 34 Iowa, 339; Van Arsdale v. Rundel, 82 Ill. 63; Rogers v. Bemus, 69 Pa. 432; Hinckley v. Beckwith, 13 Wis. 31; Leonard

This is illustrated by several recent cases. Plaintiff was a coal merchant and had contracted to supply coal to steamers; he had also contracted for coal with the defendant, who knew the purpose for which the coal was wanted. The defendant

noweth, 26 Wis. 656; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; Benton v. Fay, 64 Ill. 417; Grindle v. Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31; Hamilton v. Magill, 12 L. R. Ire. 186, 204; Kramer v. Messner, 101 Iowa, 88, 69 N. W. Rep. 1142; Guetzkow v. Andrews, 92 Wis. 214, 53 Am. St. 909, 66 N. W. Rep. 119; Agius v. Great Western Colliery Co., [1897] 1 Q. B. 413; Chalice v. Witte, 81 Mo. App. 84; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. Rep. 749; Waco Artesian Water Co. v. Cauble, 19 Tex. Civ. App. 417, 47 S. W. Rep. 538; Drug Co. v. Byrd, 92 Fed. Rep. 290, 34 C. C. A. 351; Central Trust Co. v. Clark, id. 354, 92 Fed. Rep. 293; Liman v. Pennsylvania R. Co., 4 N. Y. Misc. 539, 24 N. Y. Supp. 824, citing the text; Blagen v. Thompson, 23 Ore. 239, 31 Pac. Rep. 647, 18 L. R. A. 315; Machine Co. v. Compress Co., 105 Tenn. 187, 58 S. W. Rep. 270; McNeill v. Richards, [1899] 1 Ire. 79; Hirschhorn v. Bradley, — Iowa, —, 90 N. W. Rep. 592; Trigg v. Clay, 88 Va. 330, 335, 13 S. E. Rep. 434, 29 Am. St. 723.

In *Borries v. Hutchinson*, 18 C. B. (N. S.) 445, the defendant contracted to sell to the plaintiff seventy-five tons of caustic soda, an article not ordinarily procurable in the market, at a given price, to be delivered on the rails at Liverpool for Hull, twenty-five tons in June, twenty-five tons in July and twenty-five tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered twenty-six tons in all. At the time of entering into the contract the defendant was aware that the plaintiffs were buying the

soda for a foreign correspondent, but did not know until the end of August that it was designed for St. Petersburg. The plaintiffs had, in fact, contracted to sell the soda to Heitmann, a merchant at St. Petersburg, at an advanced price, and he had contracted to sell it to one Heinburger, a soap manufacturer of that place, for a still further advance. In consequence of the late delivery of the twenty-six tons, the plaintiffs were compelled to pay a higher rate of freight and insurance. This amounted to 40*l.* 17*s.* For their failure to deliver the remainder to Heitmann they were called upon to pay and actually paid 159*l.*, which he claimed as the compensation he had been obliged to pay Heinburger for the failure to perform his subcontract with him. In this action by the plaintiffs to recover from the defendant for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the forty-nine tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to Heitmann, in other words, the loss of the profit on the resale; and it was held that they were also entitled to recover the 40*l.* 17*s.*, the excess of freight and insurance, which was the necessary result of the defendant's breach of contract, but that the defendant was not chargeable with the 159*l.* which the plaintiff had paid to Heitmann to compensate Heinburger for the loss of his bargain; this was held too remote. As to the latter item, Erle, C. J.: "He (the defendant) had no notice of the subse-

broke its contract by failing to furnish coal as fast as it was needed; in consequence a steamer was delayed, a claim made on the plaintiff for damages and a suit was brought to enforce that claim. The defendant refused to defend such suit, which was defended by the plaintiff, who satisfied the judgment therein, and then sued the defendant for reimbursement. His right to recover was held to be within the rule of *Hadley v. Baxendale*.<sup>1</sup> In another case<sup>2</sup> the defendant supplied a defective chain to a firm of stevedores for use in discharging a cargo from a vessel owned by a third party. He was taken to have known that such firm would employ men to do the unloading, and was liable for the injury received by a man so employed, through a defect in the chain, notwithstanding such defect might have been discovered by the employer in the exercise of reasonable care. Such injury was the natural consequence of the defect. The defendant's agent guaranteed that a theater troupe to whom he sold tickets should arrive at their destination by a stated time, which they did not do. A recovery was allowed of the damages sustained by missing engagements on account of the delay, but not for missing other engagements because of the breaking up of the troupe through failure to pay its members, which failure resulted from the loss of the money which would have been received from keeping the first-mentioned engagements; that result could have been avoided by a like sum of money realized from any other source.<sup>3</sup> The defendant contracted with the owner of a vessel to tow her to a designated point, where she was to be loaded, and to keep a tug there for the removal of the vessel. No tug was kept there in pursuance of the contract, and none was available for service there. The defendant failed to move the

quent resale; and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural or necessary consequence of the breach of the contract he was entering into." *Hinde v. Liddell*, L. R. 10 Q. B. 265.

<sup>1</sup> *Aguis v. Great Western Colliery*

Co., [1899] 1 Q. B. 413, approving *Hammond v. Bussey*, 20 Q. B. Div. 79, and doubting *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35, and *Fisher v. Val de Travers Asphalte Co.*, 1 C. P. Div. 511; *Scott v. Foley*, 5 Commercial Cas. 53.

<sup>2</sup> *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, [1895] 2 id. 640.

<sup>3</sup> *Foster v. Cleveland, etc. R. Co.*, 56 Fed. Rep. 434. See note to § 52.

vessel to a place of safety, and in consequence of a storm she was greatly damaged and was sunk. The liability of the defendant was co-extensive with the loss suffered by the plaintiff.<sup>1</sup> The breach of a contract for building a motor railway, entered into for the purpose of securing by performance the enhancement of the value of land, renders the party in default liable for the loss of the profits the purchaser of such land would have made if the road had been built.<sup>2</sup> But this rule does not apply as a defense to an action by a railroad company upon a subsidy contract.<sup>3</sup> One who has broken his contract with the stockholders of a corporation to loan it money is not bound to foresee that they would give their notes to another as a bonus to obtain a loan, and is not liable for the value of their shares.<sup>4</sup>

[83] § 52. **Same subject; market value; resale; special circumstances.**—Where an article had been bargained for for a particular and exceptional purpose, unknown to the seller, [84] and had no market value, it was held that the vendor was liable for the damages which would have been sustained if it had been used for the purpose for which he supposed it would be used.<sup>5</sup> If the vendor has notice that his vendees have contracted to resell the article he will be held liable for loss of profits by such resale if he fails to fulfill his contract, though he was not informed of the price in the contract to resell, unless there is a market value for the article or the reselling price is of an unusual or exceptional character.<sup>6</sup> Since the decision of *Hadley v. Baxendale*,<sup>7</sup> the rule first stated in that case for ascertaining damages which are recoverable for breach of contract, namely, that they be such as arise “naturally, i. e., according to the usual course of things from such breach of contract itself,” has been universally assented to;

<sup>1</sup> *Loud & Sons' Lumber Co. v. Peter*, 20 Ohio Ct. Ct. 73; *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. Rep. 685.

<sup>2</sup> *Blagen v. Thompson*, 23 Ore. 239, 18 L. R. A. 315, 31 Pac. Rep. 647; *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. Rep. 525.

<sup>3</sup> *Coos Bay R. Co. v. Nosler*, 30 Ore. 547, 48 Pac. Rep. 361.

<sup>4</sup> *Kelly v. Fabrney*, 38 C. C. A. 103, 97 Fed. Rep. 176.

<sup>5</sup> *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181.

<sup>6</sup> *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *Lewis v. Rountree*, 79 N. C. 122; *Guetzkow v. Andrews*, 92 Wis. 214, 53 Am. St. 909, 66 N. W. Rep. 119; *Snell v. Cottingham*, 76 Ill. 161.

<sup>7</sup> 9 Ex. 341.

as also what is said in the opinion of Alderson, B., to the effect that if a contract be made under special circumstances, which are unknown to the party breaking it, they cannot be taken into consideration for the purpose of enhancing the damages; that such a defaulting party, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise from such a breach generally in the great multitude of cases unaffected by special circumstances.<sup>1</sup> His observations, however, in favor of a more extended liability, embracing damages brought within the contemplation of the parties at the time of contracting by communication of special circumstances, have been the subject of some criticism and conflict of opinion. In England, however, the cases have been uniformly decided in conformity to the doctrine of that case;<sup>2</sup> but there have been *dicta* in several of a contrary tendency, especially with reference to its application to carriers, who were supposed to have no option to refuse to accept goods offered for transportation, in view of enlarged responsibility on account of special circumstances, unless an increased compensation be paid.<sup>3</sup> The tendency of the decisions there

<sup>1</sup> Griffin v. Colver, 16 N. Y. 490; Western U. Tel. Co. v. Graham, 1 Colo. 230; Sanders v. Stuart, 1 C. P. Div. 326; Great Western R. Co. v. Redmayne, L. R. 1 C. P. 329; Master-ton v. Mayor, 7 Hill, 61; Cuddy v. Major, 12 Mich. 368; Johnson v. Mathews, 5 Kan. 118; Lawrence v. Wardwell, 6 Barb. 423; Portman v. Middleton, 4 C. B. (N. S.) 322; Gee v. Lancashire, etc. R. Co., 6 H. & N. 211; Hales v. London, etc. R. Co., 4 B. & S. 66; Travis v. Duffau, 20 Tex. 49; Fox v. Harding, 7 Cush. 516.

<sup>2</sup> Agius v. Great Western Colliery Co., [1899] 1 Q. B. 413.

If the goods contracted for are of a particular shape and description, and the party who is to furnish them knows that the contract is substantially like one the purchaser has made with a customer of his, and that it is made to enable the purchaser to fulfill such contract,

and there is no market for the goods, the latter may recover as damages for the breach the profit he would have made had he been able to supply his customer, and also damages recovered against him by the latter for the resulting breach. In estimating such last-mentioned damages the judgment of a foreign court will be regarded as establishing a reasonable sum for their computation. The liability of the purchaser to his customer for a penalty if he failed to keep his contract with him must have been known to the original vendor. Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85.

<sup>3</sup> See §§ 900, 913, 914. In Borries v. Hutchinson, 18 C. B. (N. S.) 445, and in Smeed v. Foord, 1 E. & E. 602, the damages were larger and the recovery sustained by reason of the defendant having notice of the purpose of the other party in making the

[86] appears to be to require the special purpose of the contract to be so far in view when the contract is made that it is reasonable to infer a tacit acceptance of it as made for the accomplishment of that object, and a tacit consent to be bound

contract. *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *Smith v. Green*, 1 C. P. Div. 92; *Simpson v. London, etc. R. Co.*, 1 Q. B. Div. 274; *Wilson v. General Iron S. Co.*, 47 L. J. (N. S.) (Q. B.) 239.

In *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, the plaintiffs delivered to the defendant for carriage to Vancouver's Island several cases of machinery intended for the erection of a saw mill. The defendant knew generally that the cases contained machinery. On the arrival of the vessel at her destination, one of the cases which contained parts of the machinery was missing, and without these parts the mill could not be completed. The plaintiffs were obliged to replace these parts from England at a cost, including freight, of 353*l.* 17*s.* 9*d.*, and suffer a delay of twelve months. A fair rate of hire of the machinery, applied to the purposes for which it was required by the plaintiffs, would have been for twelve months 2,646*l.* 2*s.* 3*d.*, and the plaintiffs sought to recover that amount, but it was held not recoverable, because the defendant did not know that the missing case contained portions of the machinery which could not be replaced at Vancouver's Island, and without which the rest could not be put together. Willes, J., said: "The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or

his default, for the full profits they might have made by the use of the mill, if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. Several circumstances occur to one's mind in this case to show that there was no such knowledge on the defendant's part that would warrant the conclusion contended for by the plaintiffs. In the first place the carrier did not know that the whole of the machinery would be useless if any portion of it failed to arrive, or what that particular part was. And that suggests another consideration. He did not know that the part which was lost could not be replaced without sending to England. And applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to



to more than the ordinary damages, in case of default, on that account; otherwise the damages in respect to that object [87] are not deemed to have been within the contemplation of the parties. This is probably also the doctrine of the American

the conclusion that it was contemplated at the time of the contract that he would be liable for all these consequences in the event of a breach. Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge, in effect, can only be evidence of fraud or of an understanding by both parties that the contract is based upon the circumstances which are communicated."

In the subsequent case of *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, the defendant, as a carrier, was guilty of a negligent delay in the transportation of goods consigned to fill a special contract at an exceptionally high price. The carrier had notice that the goods were for a purchaser who would not take them unless they were offered on time, but the carrier was not informed of the contract price. It was considered that the notice was not sufficient to charge the defaulting carrier with damages computed on the basis of the loss of the bargain for such an unusual and exceptional price. It was also held that the notice must be such as leads to the inference that the carrier accepts the goods assenting to the increased responsibility as part of the contract. *Kelly, C. B.*, said on appeal (L. R. 8 C. P. 136): "The goods with which we have to deal are not the subject of any express statutory enactment; the case in regard to them depends on the

common law, taken in connection with the acts relating to the defendant's railway company. Now it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these and carry them as directed to the place of delivery, and there deliver them. But suppose that an intimation is made to the railway company, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract, and will lose so many pounds if they cannot fulfill it; what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If then they are bound to receive and so do without more, what is the effect of the notice? Can it be to impose on them a liability to damages to any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice, without more, could have any such effect. It does not appear to me that the railway company has any power such as was suggested to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course, they may enter into a contract, if they will, to pay any amount of damages for the non-performance of their contract, in consideration of an increased rate of carriage, if the consignors are willing to pay it; but in the absence of any such contract expressly entered into, there being no power on

courts.<sup>1</sup> The parties are not supposed to actually intend to pay damages by any other than a legal standard, unless they [88] formally liquidate them, whether there are special circumstances or not. They know the legal principle of com-

the part of the company to refuse to accept the goods or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me that any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned."

In *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473 (approved in *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85), the plaintiff contracted for the purchase of six hundred and sixty-six sets of wheels and axles, which he designed to use in the manufacture of wagons; and the wagons he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a wagon per day. The defendant, who contracted to sell the wheels and axles, was informed of the other contract, but not of the amount of the penalties. Some delay occurred in the plaintiff's deliveries, by the defendant's fault, and in consequence

the plaintiff had to pay 100% in penalties; and the action was brought to recover that sum of the defendant. There was no market in which the goods could be obtained, and it was therefore contended in behalf of the defendant that only nominal damages could be recovered. The court held the defendant liable for substantial damages, not for the penalties the plaintiff had been obliged to pay, the defendant having no notice of them, but the reasonable value of the use of the wagons during the delay. A verdict of 100% was sustained. But the court, by Blackburn, J., remarked: "If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand." After referring to *Hadley v. Baxendale* he continued: "But an inference has been drawn from the language of the judgment, that whenever there

<sup>1</sup>Notice to a carrier, after goods have been shipped, of circumstances which render special damages a probable consequence of delay does not affect the original contract so as to render the carrier liable for such damages although the subsequent delay is unreasonable. *Bradley v. Chicago, etc. R. Co.*, 94 Wis. 44, 68 N. W. Rep. 410; *Missouri, etc. R. Co. v. Belcher*, 35 S. W. Rep. 6 (Tex. Sup. Ct.).

If the bill of lading is silent as to the time goods are to be delivered the fact that notice was given the carrier that unusual loss would re-

sult if there was delay in delivery may be shown by parol. *Central Trust Co. v. Savannah, etc. R. Co.*, 69 Fed. Rep. 683.

"In the absence of a definite contract for carriage to a given point by a given time, with such reasons for its making as would naturally lead the agent of the carrier to contemplate the profits the passenger expected to realize, it is clear that the damage claimed for the failure to realize such profits is too uncertain and remote." *Southern R. Co. v. Myers*, 32 C. C. A. 19, 87 Fed. Rep. 149.

compensation and the rules subsidiary to it; and when they do not liquidate the damages they are content to enter into the contract and leave the measure of liability to be decided by law; they know that the law will require them to make com- [89]

has been notice, at the time of the contract, that some unusual consequence is likely to ensue, if the contract is broken the damages must include that consequence; but this is not, as yet, at least, established law. In *Mayne on Damages* (p. 10, 2d ed. by Lumley Smith), in commenting on *Hadley v. Baxendale*, it is said: 'The principle laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary result of a breach can be supposed to have been so contemplated, unless it was communicated to the other party, are, of course, clearly just. But, it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability. . . . The law says that every one who breaks a contract shall pay for its natural consequences; and, in most cases, states what those consequences are. Can the other party, by merely acquainting him with a number of further consequences, which the law would not have implied, enlarge his responsibility, without any contract to that effect?' We are not aware of any case in which *Hadley v. Baxendale* has been acted upon in any such way as to afford an answer to the learned author's doubts; and, in *Horne v. Midland R. Co.*, L.

R. 8 C. P. 131, much that fell from the judges in the exchequer chamber tends to confirm those doubts." In this case the court held that the plaintiff was not entitled to damages for the delay, exceeding the penalty he was bound for and had paid to his vendee.

In *Hinde v. Liddell*, L. R. 10 Q. B. 265, the defendant contracted to supply the plaintiff two thousand pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October the defendant informed the plaintiff that he would be unable to complete his contract by the time specified; and, thereupon, the plaintiff endeavored to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirtings, of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to the plaintiff. The plaintiff recovered against the defendant this excess over the contract price. It is manifest that the plaintiff suffered damage to that amount, by reason of delivering the substituted article to his vendee, without realizing anything for having procured an article of superior quality. Is it possible that if there had been no subcontract which necessitated this loss, and the plaintiff had the article on hand,

pensation in case of a breach for damages which directly arise therefrom in view of the intrinsic nature of the contract, and of the special circumstances known to them when it was made

that he could have recovered damages by that standard? It would have been said that no loss could be inferred from such a purchase. *Borries v. Hutchinson* was approved and said to be directly in point, and the same judge, Blackburn, J., said, in giving judgment: "In the present case the goods are for a foreign market; and it was admitted that the only reasonable thing the plaintiff could do was to put himself in the same position as if the defendants had fulfilled their contract, by obtaining a somewhat dearer article. I do not see on what principle it can be said that the plaintiff is not entitled to recover this difference in price. We do not decide anything as to what the effect of a notice of the plaintiff's subcontract might have been. Under the circumstances, the value of the goods contracted to be supplied by the defendants, at the time of their breach of contract, was the price the plaintiff had to give for the substituted article."

In *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. (1885) 85, it is said that a vendor who contracts with a purchaser knowing that the latter has a foreign customer for the articles contracted for must understand that if such purchaser fails to fulfill his contract he will be liable to his customer for damages; and while the judgment of a foreign court will not be held binding as to the amount of damages, it will be assumed that the sum fixed thereby is reasonable.

In *Simpson v. London, etc. R. Co.*, 1 Q. B. Div. 274, the plaintiff, who was a manufacturer of cattle food, was in the habit of sending samples of his goods to cattle shows, with a show tent and banners, and attend-

ing there himself to attract custom. He intended to exhibit some of these samples at the Newcastle show, and delivered them for transmission to the defendants. The contract was made with the defendants' agent at a cattle show at Bedford, where the plaintiff had been exhibiting his samples, and where the defendants had an agent and office on the show ground for the purpose of seeking traffic. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son consigning the goods as "boxes of sundries" to "Simpson & Co., the show ground, Newcastle on Tyne," and that he indorsed the note "must be at Newcastle on Monday certain," meaning the next Monday, the 20th July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, nor as to the goods being samples. They did not arrive until several days after time, and when the show was over. It was found that the plaintiff obtained custom by exhibiting his samples at shows, but no evidence was given as to his prospects with regard to the Newcastle show in particular. A verdict by consent was entered for 20% beyond a sum which had been paid in, with leave to move to enter the verdict for the defendants, if the court should be of opinion that the plaintiff was not entitled to recover for either loss of time in waiting for the goods or loss of profits. It was held that the plaintiff was entitled to the verdict. Cockburn, C. J., said: "The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is specially brought to the no-

which disclose some particular object different from or [90] beyond that which would be suggested by the mere words of the contract.<sup>1</sup>

tice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." See *Kennedy v. American Exp. Co.*, 22 Ont. App. 278.

In *Jameson v. Midland R. Co.*, 50 L. T. Rep. 426, the plaintiff delivered a parcel at the defendant's office addressed to M., Stand 23, Show Ground, etc.; nothing was said by him. The label so addressed was sufficient notice that the parcel was being sent to a show, and the defendant was liable for the loss of profits and expenses resulting from its delay.

In *Mayne on Dam.* (6th ed.), p. 41, the author says: "In the present state of the authorities, therefore, I would suggest that in place of the third rule supposed to be laid down by *Hadley v. Baxendale*, the law may perhaps be as follows:

"First — Where there are special circumstances connected with a contract, which may cause special damages to follow if it is broken, mere notice of such circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such special damage.

"Secondly — Where a person who has knowledge or notice of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evi-

dence, from which it may be inferred that he has accepted the additional risk in case of breach.

"Thirdly. — Where the defendant has no option of refusing the contract and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances is not a fact from which an undertaking to incur a liability for special damages can be inferred.

"Fourthly — Even if there were an express contract by the defendant to pay for special damages, under the circumstances last supposed, it might be questioned whether such a contract would not be void for want of consideration. Take the case of a railway passenger who buys his ticket, informing the clerk of some particular loss which would arise upon his being late. Suppose the clerk were to undertake that the company should be answerable for the loss, and that such undertaking should be held to be within the sphere of his duty. Would it not be purely gratuitous? The consideration for any promise by the company, arising from the payment of the fare, would be exhausted by their carrying the passenger to his destination or paying the ordinary damages for failure to do so. What would there be left to support the special undertaking to pay an exceptional penalty? Of course, it would be different if a special payment were made by way of premium for incurring the increased risk." But see *Foster v. Cleveland, etc. R. Co.*, 56 Fed. Rep. 434, stated in § 51, as to the last suggestion.

<sup>1</sup> *Booth v. Spuyten Duyvil Rolling*

Doubtless it is essential, in order to bring within the contemplation of the parties damages different from and larger in amount than those which usually ensue, that the special circumstances out of which they naturally proceed shall have

Mill Co., 60 N. Y. 487. In this case Church, C. J., said, referring to the English cases: "Some of the judges in commenting upon it (the doctrine under consideration) have held that a bare notice of special circumstances which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the view expressed in these cases, and I do not think that the court in *Hadley v. Baxendale* intended to lay down any different doctrine." But the defendant in this case was held to be liable for the loss sustained on a contract which the plaintiffs had with the New York Central Railroad Co., by reason of the defendant's breach, and that loss was held to be brought within the contemplation of the parties by mere notice, generally, that there was a contract depending on the defendant's performance.

In *Liman v. Pennsylvania R. Co.*, 4 N. Y. Misc. 539, 24 N. Y. Supp. 824, the plaintiff was under contract to exhibit one R. in Chicago for two weeks, and four days before the time fixed therefor applied to the defendant at its office in New York and stated the circumstances; the defendant agreed to deliver to R. a railroad ticket to Chicago, but failed to do so. Judgment in favor of the plaintiff for the sum paid for the ticket and profits on R.'s engagement was affirmed. The court did not interpret *Booth v. Spuyten Duyvil Rolling Mill Co.*, *supra*, as intending that a contracting party may, notwithstanding that he has been sufficiently informed of the exist-

ence of a certain other contract, the performance of which is dependent upon performance of the proposed contract with him, to put him upon reasonable inquiry in respect thereto, shield himself against consequential damages by wilfully or deliberately abstaining from the inquiry. If, under such circumstances, a party refrains from inquiry he cannot set up his ignorance to limit his liability.

A manufacturer contracted to furnish machinery and make essential repairs upon the plant of a compress company by a fixed date, which was known by both parties to be the beginning of the season for the operation of the plant, which could only be operated during a part of the year; both parties also knew that it was the intention to have the plant in readiness for the opening of the season. The notice to the defendant was sufficient to make it liable for special damages resulting from its delay. *Machine Co. v. Compress Co.*, 105 Tenn. 187, 53 S. W. Rep. 270; *Neal v. Pender-Hyman Hardware Co.*, 122 N. C. 104, 29 S. E. Rep. 96, 65 Am. St. 697.

In *Snell v. Cottingham*, 72 Ill. 161, it was held that a contractor who fails to finish a railroad by the time limited in his contract cannot be held for the loss occasioned to the owner of the road by reason of another contract between him and a third party, for the use of the road after the time it should have been completed, even though he may have known of the existence and the terms of such other contract at the time of entering into his own, unless he expressly agrees to such a rate of damages. A similar doctrine is laid down

been known to the party sought to be made liable in such manner, at the time of contracting, as to make it manifest to him that if compensation in case of a breach on his part is accorded for actual loss it must be for a loss resulting from that special state of things which those circumstances portended. Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily [91] be on such a default is immaterial if the contracting party assume the obligation which he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application instead of the principle, which is paramount and always applicable. What are the usual damages which result from the breach of a contract? There is certainly no customary amount, nor is there any rule of damages which is universal

in *Bridges v. Stickney*, 38 Me. 369; *Hunt v. Oregon Pacific R. Co.*, 36 Fed. Rep. 481. See *Clark v. Moore*, 3 Mich. 55.

The Illinois case is, probably, not to be taken as declaring a general principle. The decision was doubtless influenced by the damages which would have been recovered if the rule had been applied. It is said in the opinion: Had it been known, that it was expected appellees would be held responsible for such extraordinary damages, it is hardly probable that they would have entered into the contract, for the consequences of a failure for only a few

days would be most disastrous. The damages insisted upon exceed \$44,000, a sum enormously out of all proportion to the amount to be paid for the entire work. The same distinction is made in other cases. Thus, it is said in *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, 495: It is sufficient to hold, what appears to me to be clearly just, that he is bound by the price unless it is shown that the price is extravagant, or of an unusual or exceptional character. See *Guetzkow v. Andrews*, 92 Wis. 214, 53 Am. St. 909, 66 N. W. Rep. 119.

like the principle for allowance of due compensation. If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply him without loss unless the market price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements of value; and recourse is had to the principle to determine the measure of redress; even a contract of resale made by the vendee and of which the vendor had no notice may be considered.<sup>1</sup>

<sup>1</sup>France v. Gaudet, L. R. 6 Q. B. 199; *McHose v. Fulmer*, 73 Pa. 365; *Carroll-Porter Boiler & Tank Co. v. Columbus Machine Co.*, 5 C. C. A. 190, 55 Fed. Rep. 451; *Hockersmith v. Hanley*, 29 Ore. 27, 44 Pac. Rep. 497, citing the text.

*France v. Gaudet*, *supra*, was an action for the conversion of the property sold, and hence is not to be considered as authority to the full extent of the proposition to which it is cited. If the article the vendor has contracted to supply or an article of the same quality cannot be procured in the market, it is presumed that such fact was within the contemplation of the parties to the contract. *McHose v. Fulmer*, *supra*. But this rule is denied in an English case (*Thol v. Henderson*, 8 Q. B. Div. 457). There was a contract to deliver goods which were not obtainable in the market; the purchaser had entered into a contract for their sale. The vendor had no knowledge of the particular contract, but was aware that the goods were ordered for the purpose of reselling them. Such knowledge was held not to bring the case within the rule of *Hadley v. Baxendale*, so as to allow the recovery of profits which

would have been made if there had not been a breach of the contract. This is too strict an application of the rule, because it was immaterial to the vendor who his purchaser's customer was; the former had knowledge sufficient to act as an incentive to the prompt fulfillment of his contract, and to apprise him of the fact that its breach would especially damage the vendee. See *Loescher v. Disterberg*, 26 Ill. App. 520, which is in harmony with *McHose v. Fulmer*, *supra*.

In *Hamilton v. Magill*, 12 L. R. Ire. 186, one of the points especially relied upon by the defendant was that at the time the contract in suit was made the plaintiff had not actually completed his contract for the sale of the property purchased, and that the case should be treated as if the defendant had no other notice than that it was bought for resale generally. The answer of the court was that it appears "illogical and contrary to principle that a person who, having an offer, enters into a contract with another, which if carried out would enable him to accept that offer, but refrains from actually accepting it until he has entered into the contract, should be in a worse position



And if the goods were not bought for resale and had no market value, but were intended for some special use, the damages would be computed according to the value for the use to which the property was most obviously adapted unless the vendor knew of the intention to apply them to a different one.<sup>1</sup> Their delivery in the case where a contract of resale existed would have enabled the vendee to obtain the reselling price, and in the other to avoid the loss which has otherwise resulted from being deprived of the property. Such recoveries are not unusual. It may be said that sales are generally made of articles having a market value. True. But there is no uniform relativeness between the contract and market prices. The defaulting vendor will pay nominal damages when the market price is less than the contract price, and substantial damages, according to the excess of the former at the time the goods should have been delivered. When the vendor refused to deliver ice according to his contract, knowing when he made the agreement that it was wanted as a means of preserving fresh meat in the prosecution of the vendee's business, and the ice could not be obtained in market, what should be deemed the usual damages for a breach of the contract? Certainly not what had been the market price when ice was plenty and could be had from other sources; but its value when it should, according to the contract, have been delivered and when the vendor, as the fact probably may be, alone could supply it, and when the vendee must have it or lose a certain amount of meat, or suspend business, notwithstanding his best endeavors by other means to preserve the meat or continue his business.<sup>2</sup>

If the contract is made to serve a particular purpose, not communicated and known to both parties, nor indicated by the subject-matter of the contract, and the loss in respect to that purpose is so exceptional as neither to be within the contemplation of the parties at the making of the contract, nor

than one who makes a contract for sale on the chance of afterwards purchasing from another the goods which he has previously contracted to sell. To establish such a distinction would place the speculator in a more advantageous position than the prudent merchant."

<sup>1</sup> *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181; *Machine Co. v. Compress Co.*, 105 Tenn. 187, 58 S. W. Rep. 270.

<sup>2</sup> *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. Rep. 1129; *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219, 62 S. W. Rep. 591.

[93] within the first branch of the rule laid down in *Hadley v. Baxendale*, it cannot be recovered; but where the injury is within the contemplation of the parties, if they give the subject consideration when the contract is made, they are admonished by the prevalence of the principle of compensation in the law that, if they do not perform, the alternative of making reparation on the scale of equivalence to the actual injury will be compulsory; and there is no need of any agreement to submit to such a legal consequence. The law as laid down in *Hadley v. Baxendale* has been generally accepted in this country; it includes all such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.<sup>1</sup> And in accordance with the doctrine of that case, it is sufficient if the special circumstances under which the contract was actually made were communicated to the party sought to be charged, and the damages resulting from the breach are such as both parties would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach under those circumstances. As said by Selden, J.: "The broad general rule . . . is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed."<sup>2</sup> And this leads naturally to the consideration of the certainty which is necessary to warrant the recovery of damages.

<sup>1</sup> 9 Ex. 353.

<sup>2</sup> *Griffin v. Colver*, 16 N. Y. 494; *Savannah, etc. R. Co. v. Pritchard*, 77 Ga. 412, 418, 4 Am. St. 92, 1 S. E. Rep. 261; *Benjamin v. Puget Sound Commercial Co.*, 12 Wash. 476, 41 Pac. Rep. 166, quoting the text; *Collins v. Lavelle*, 19 R. I. 45, 31 Atl. Rep. 434, citing the text.

In a late case the defendant con-

tended for the rule that not only must the parties have notice of the contract for the furtherance of which the plaintiff made the contract in suit, but there must be something in the terms of the latter, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume a larger engagement, a wider re-

## SECTION 5.

## REQUIRED CERTAINTY OF DAMAGES.

## § 53. Must be certain in their nature and cause. [94]

Damages must be certain both in their nature and in respect to the cause from which they proceed. Judge Selden said that the requisite that the damages must not be the remote, but the proximate, consequence is in part an element of the required certainty.<sup>1</sup> In the preceding pages the requirement that the damages be the natural and proximate result of the act complained of has been discussed; but mainly with reference to the consequences as a whole. Now it remains to consider the certainty necessary not only in regard to the consequences as a whole but also in detail. A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury.<sup>2</sup> So it may exist where a known and

sponsibility, than is assumed in ordinary contracts for the sale and delivery of merchandise. The answer was that where notice is brought home to the vendor that the goods are purchased to be put to a particular use, he is chargeable with the consequences of a failure to perform, and with the results which such notice fairly apprised him would follow upon his default. *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. Rep. 25, citing *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Richardson v. Chynoweth*, 26 Wis. 656; *Illinois Central R. Co. v. Cobb*, 64 Ill. 128; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

<sup>1</sup> *Griffin v. Colver*, 16 N. Y. 494.

<sup>2</sup> See *Beiser v. Grever & Twaite Co.*, 11 Ohio Dec. 444.

As where there was a breach of a contract to elect one president of a bank for a term of years and at an agreed annual salary, when the election, if there had been no breach, could have been for only one year,

to which time the recovery of the salary was limited. There could be no recovery for any of the subsequent years within the contract term because the damages would be too remote and uncertain. *Witham v. Cohen*, 100 Ga. 670, 28 S. E. Rep. 505; *Kenyon v. Western U. Tel. Co.*, 100 Cal. 454, 35 Pac. Rep. 75.

Another example is afforded by a contract so vague and indefinite that it does not furnish a safe, satisfactory or proper basis for computing the damages caused by its breach. *Hart v. Georgia R. Co.*, 101 Ga. 188, 28 S. E. Rep. 637. See *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. 30, 58 N. Y. Supp. 612.

If, in an action of tort, it be impossible to distinguish between the damage arising from the actionable injury and the damage which has another origin, the jury must make the best estimate in their power, and award compensation for the actionable injury. *Jenkins v. Pennsylvania R. Co.*, 67 N. J. L. 331, 51 Atl.

provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be certainly shown.<sup>1</sup> Many of the illustrations already given apply to the first, as where the injury is not the natural or proximate result of the act complained of; then the relation of cause and effect does not exist between the alleged cause and the alleged injury. This uncertainty may be further illustrated by the case of one who complained that the defendant had taken his flat from his ferry, and that being obliged to go in search of it in order to cross the river he left his horses attached to a wagon standing on the bank, and while he was gone they ran into the river and were drowned.<sup>2</sup> Their loss was not a natural consequence of the taking of the flat which the defendant could foresee as a probable result of his wrongful act; there was a more im-[95] mediate cause in the negligence of the owner; and after the event it cannot be ascribed with the requisite certainty to the defendant's act although it was the beginning of the series of facts which culminated in that loss.<sup>3</sup> A grantee of land cannot recover damages for the breach of the grantor's covenant against incumbrances because of an existing inchoate right of dower in the premises, a sum paid by himself to an auction-

Rep. 704. See *Ogden v. Lucas*, 48 Ill. 492; *Harrison v. Adamson*, 86 Iowa, 693, 53 N. W. Rep. 334; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Chicago & N. R. Co. v. Hoag*, 90 Ill. 339; *Mark v. Hudson River Bridge Co.*, 103 N. Y. 28, 8 N. E. Rep. 243.

<sup>1</sup> As where there has been a breach of contract by a water company to supply water to a municipality for extinguishing fires. *Pothinger v. Owensboro Water Co.*, 6 Ky. L. Rep. 453. See *Pacific Pine Lumber Co. v. Western U. Tel. Co.*, 123 Cal. 428, 56 Pac. Rep. 103; *Kenyon v. Same*, 100 Cal. 454, 35 Pac. Rep. 75.

The pecuniary interest which a husband has in the chance that an embryo not quickened into life would become a living child is so absolutely uncertain that the loss of

that chance cannot be recovered for. *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 38 N. E. Rep. 454, 42 Am. St. 738, 26 L. R. A. 46.

<sup>2</sup> *Gorden v. Butts*, 2 N. J. L. 334.

<sup>3</sup> See *Walker v. Goe*, 3 H. & N. 395, 4 id. 350; *Dubuque Ass'n v. Dubuque*, 30 Iowa, 176; *Hofnagle v. New York, etc. R.*, 55 N. Y. 608; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Lewis v. Lee*, 15 Ind. 499; *Ashley v. Harrison*, 1 Esp. 49; *Barber v. Lesiter*, 7 C. B. (N. S.) 175; *Collins v. Cave*, 4 H. & N. 225; *Everard v. Hopkins*, 2 Bulst. 332; *Walker v. Moore*, 10 B. & C. 416; *Hayden v. Cabot*, 17 Mass. 169; *Green v. Mann*, 11 Ill. 613; *Hargous v. Ablon*, 3 Denio, 406, 45 Am. Dec. 481; *Brayton v. Chase*, 3 Wis. 456; *Chatterton v. Fox*, 5 Duer, 64.

eer for selling them to a person who refuses to complete the purchase on discovering the incumbrance.<sup>1</sup>

In an action for the wrongful revocation of an agreement to submit a controversy to arbitration the plaintiff is not entitled to recover damages for the trouble and expense incurred in making the agreement; but he can recover for his loss of time, and for his trouble and necessary expenses in preparing for a hearing, such as employing counsel, taking depositions, paying witnesses and arbitrators, so far as such preparations are not available for a subsequent trial in court.<sup>2</sup> Where it was agreed that a pending action between the parties should be discontinued and submitted to arbitration, and one of them subsequently revoked the submission, the other recovered the costs and expenses he incurred in the discontinued suit.<sup>3</sup> And where one of the parties had released a cause of action against a third person upon the agreement of the other to pay such a sum as should be awarded, the one who revoked the submission was liable for the costs of the other incurred in the arbitration, and also for the amount of his claim for the loss of his cause of action.<sup>4</sup> The Vermont cases cited are distinguished from one in which the contract to arbitrate was wholly executory when the breach occurred. "Where nothing has been done in partial execution of the covenant, and the covenant does not fix anything by way of penalty or liquidated damages, the loss arising from a refusal to fulfill is usually wholly conjectural because it is impossible to prove that the party would have profited by the arbitration."<sup>5</sup>

A defendant chartered the plaintiff's vessel from Liverpool to Puerto Cabello at a stipulated freight; a clause was after-

<sup>1</sup> Harrington v. Murphy, 109 Mass. 299.

<sup>2</sup> Pond v. Harris, 113 Mass. 114.

<sup>3</sup> Hawley v. Dodge, 7 Vt. 237.

<sup>4</sup> Day v. Essex County Bank, 13 Vt. 97.

<sup>5</sup> Munson v. Straits of Dover S. S. Co., 43 C. C. A. 57, 102 Fed. Rep. 926.

When a party to a submission agreement has covenanted therein to pay the award by revoking the submission he breaches the covenant, and if, pursuant to the agree-

ment, a pledge has been deposited to secure the payment of the award, it may be foreclosed to the extent of the damages fixed by statute for the revocation of a submission. The damages so fixed for preparing for and conducting the arbitration may be recovered notwithstanding the submission provides that the fees of arbitrators and witnesses shall be paid equally by the parties. *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. Rep. 671.

wards added to the charter-party allowing the defendant to send on a part of the cargo to Maracaibo, with a proviso that any expense incurred by so doing should be borne by the charterer. Under pretense of an attempt by the master to evade the customs on the part so shipped, the custom-house authorities at Puerto Cabello wrongfully imposed a fine of \$500 on him, and detained the vessel for several months; but would have allowed her to depart if the fine had been paid, which the master had not the means to pay and did not. The government agreed afterwards to pay the master \$5,000 for the wrongful detention, but did not. It was held that the owner of the vessel could recover from the charterer neither the loss [96] sustained by the detention nor the expense incurred in repairing the damage to the ship in consequence thereof, nor for the costs of legal proceedings taken by him in respect to the ship, nor for the fine.<sup>1</sup> Where the object of a bonus contract providing for the erection of a mill was to enhance the value of the property in the place in which the mill was to be, the damages resulting from the sale of the mill without requiring the vendee to bind himself to fulfill the conditions of the original contract, as it stipulated for if a sale should be made, and the burning of the mill, without any obligation on the vendee's part to rebuild and operate it for the period required, are not clearly ascertainable in their nature and origin, but are speculative.<sup>2</sup> One named as a director of a proposed corporation persuaded others so named and others who expected to become members of it not to do so. For the misrepresentations made to accomplish such result the person making them was not liable to those who were proposed as directors for the loss of the profits resulting from the failure to organize the corporation.<sup>3</sup>

**§ 54. Liability for the principal loss extends to details and incidents.** Where the alleged wrong or breach of contract is shown with the requisite certainty to be the cause of the injury in question it is also to be deemed the cause of all its concomitant and incidental details which are constituent

<sup>1</sup> *Sully v. Duranty*, 33 L. J. (Ex.) 319.

<sup>3</sup> *Martin v. Deetz*, 102 Cal. 55, 36 Pac. Rep. 368, 41 Am. St. 151.

<sup>2</sup> *Hudson v. Archer*, 9 S. D. 240, 68 N. W. Rep. 541

parts of the injury, including necessary and judicious expenditures made to stay or efface the wrong or limit its consequences.<sup>1</sup> A riparian owner brought an action for polluting the waters of a stream running through his farm. He recovered for the loss of an opportunity of renting his grist-mill, the diminution in the rental value of his farm, and the inconveniences he was put to in the use of the same, resulting directly from the conduct of the defendant.<sup>2</sup> A plaintiff's house was injured by the partial falling in of the partition wall between it and the defendant's house, which was caused by digging too near the wall for the purpose of deepening the cellar under it. No notice was given by the defendant of his intention to deepen his cellar, and evidence was offered to show that the excavation was done in a careless and negligent manner, and also to show that the business of the plaintiff, who kept an ice-cream saloon and made cakes and other articles in that line, was interrupted for several days. The court held that the plaintiff was entitled to such damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury, and to compensate him for the loss consequent upon the interruption of his business; and to show the latter, he might prove its usual profits prior to the wrong.<sup>3</sup> If a collision between vessels results in

<sup>1</sup> *McDaniel v. Crabtree*, 21 Ark. 431; *Smith v. Condry*, 1 How. 35; *Loker v. Damon*, 17 Pick. 284; *Chalice v. Witte*, 80 Mo. App. 84, 95, quoting the text. See § 26.

<sup>2</sup> *Gladfelter v. Walker*, 40 Md. 3.

<sup>3</sup> *Brown v. Werner*, 40 Md. 15; *White v. Moseley*, 8 Pick. 356; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Allison v. Chandler*, 11 Mich. 542; *Collins v. Lavelle*, 19 R. I. 45, 31 Atl. Rep. 434, citing the text. See § 70.

*Walrath v. Redfield*, 11 Barb. 368 (see s. c., 18 N. Y. 457), was an action on the case for damages to the plaintiffs' saw-mill and other property, occasioned by the defendant in constructing a dam and dike below such mill, and thereby causing

the water to flow back upon the mill, and rendering it incapable of being used. The plaintiffs were held entitled to recover the value of the use of their mill during the time they were necessarily deprived of its use, and the amount which it was permanently diminished in value by the erection of the dam; but could not recover the amount of a loss upon saw logs on hand at the time of the injury, sustained either in consequence of a deterioration in their value or by a depression in the market price. The damages in respect to the logs were too speculative, uncertain, remote and contingent to be allowed even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the

disabling one of them so that her owners cannot use her for a voyage for which she has been engaged, though no regular charter-party has been entered into, the damages resulting from the loss of the profits of such voyage are the result of the collision.<sup>1</sup> If logs are deliberately stored in a stream, which is navigable for their transportation, so as to prevent the entry of logs owned by another, and in a stream which empties into the one so blocked, the person who is responsible therefor is liable to the other for the wages and board of the latter's men while waiting a reasonable time to get his logs out, for the expense of moving one crew of men out and another in, for the increased cost of driving the logs the next season, and for interest on the contract price for making the drive during such time as the payment thereof was delayed; but not for the loss of supplies left in the woods.<sup>2</sup>

logs to be sawed elsewhere, and could not have disposed of them before sawing. In actions of tort, where there has been no wilful injury, the plaintiff can only recover the damages necessarily resulting from the act complained of, and he cannot conduct himself in such a manner as to make them unnecessarily burdensome.

A more reasonable rule and one in better accord with the principle of holding a wrong-doer liable for such consequences as would naturally and in the usual course of things result from his conduct was laid down in *McTavish v. Carroll*, 17 Md. 1, an action for damages for obstructing a right of way for repairing a mill-race. The declaration alleged that the obstruction prevented the repair of the race, whereby the mill became idle and could not be worked, and the plaintiff lost the custom and trade thereof, "and the use of the same for grinding his own grain, and was, therefore, at great expense, obliged to carry it to other mills." Held, that under this declaration, evidence that the plaintiff was owner of a large body of land around his

mill, and was accustomed to grind the grain raised thereon at this mill for his cattle, horses, hands and family, and in consequence of its stoppage had been compelled to carry his grain to another mill, at a greater distance, is admissible. *Hinckley v. Beckwith*, 13 Wis. 31.

But in such a case there can be no recovery for diminished profits arising from the manufacture of flour. *Todd v. Minneapolis, etc. R. Co.*, 39 Minn. 186, 39 N. W. Rep. 318.

A more satisfactory rule is sustained by *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686, where the operations of a mill which had an established business were suspended by an overflow, and machinery in it was damaged to such an extent as to make repairs necessary. The net earnings of the past and present were proven as a basis of estimating the damages.

<sup>1</sup> *Owners of The Gracie v. Owners of The Argentino*, 14 App. Cas. 519: affirming *The Argentino*, 13 Prob. Div. 191.

<sup>2</sup> *McPheters, v. Moose River Log Driving Co.*, 78 Me. 329, 5 Atl. Rep. 270.



**§ 55. Only the items which are certain recoverable. [97]**

The charterer of a vessel who was subjected to expense in getting her off from a gas pipe which was an unlawful obstruction to the navigation of a river, and upon which she caught in passing while navigating with due care, may maintain an action against those who laid the pipe to recover for such expense, but for not for any delay in his business or other consequential damages.<sup>1</sup> Where the defendant was enjoined from removing his negroes, and upon an order of seizure they were taken out of his possession and a decree subsequently rendered in his favor, it was held his damages would, ordinarily, be what their labor would have been worth had they continued in his possession. But he would also be entitled to damages for any [98] loss that was the direct, proximate and natural consequence of the removal of the negroes out of his possession, which were not remote and speculative, involving inquiries collateral to the consideration of the wrongful act. And so he could not recover as damages counsel fees incurred in defending the suit nor expenses involved in employing an agent to attend to his other business whilst he was engaged in such defense; nor what would or might have been the profits of his business had not his possession of the negroes been interrupted.<sup>2</sup> The plaintiff's oxen were stolen in Vermont and taken to the defendant, and being found in his possession in New York were demanded and refused. The plaintiff then resorted to legal process to gain possession, and succeeded, but incurred expense therein. He was held not entitled to recover such expense as part of his damages for the conversion, in a subsequent action.<sup>3</sup> These expenses were not rejected because a remote or uncertain incident of the wrong, but because they were costs of a judicial proceeding in which such allowable expenses are collectible, and if not thus compensated cannot be recovered. The expense of regaining property tortiously taken is a part of the injury and recoverable.<sup>4</sup> Where goods wrongfully seized are taken from the wrong-doer by another, their owner may, in an action against the former, recover the amount paid the other wrong-doer to get them back.<sup>5</sup> In an action upon an attach-

<sup>1</sup> *Benson v. Walden, etc. Gas L. Co.*, 6 Allen, 149.

<sup>2</sup> *McDaniel v. Crabtree*, 21 Ark. 431.

<sup>3</sup> *Harris v. Eldred*, 42 Vt. 39.

<sup>4</sup> *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532.

<sup>5</sup> *Keene v. Dilke*, 4 Ex. 388.

ment bond the rule restricting the recovery to the natural and proximate damages will exclude any claim for injuries to credit and business,<sup>1</sup> and for mental suffering.<sup>2</sup> But where a party took a lease of a ferry, and covenanted to maintain and keep the same in good order, but instead of doing so diverted travelers from the usual landing to another landing owned by himself, by means whereof a tavern-stand belonging to the plaintiff situate on the first landing was so reduced in business [99] as to become tenantless, it was held in an action by the landlord for breach of the contract that he might assign, and was entitled to recover as damages, the loss of rent on the tavern-stand.<sup>3</sup> Where a negro was hired to make a crop and was taken away by the owner in the middle of the year, whereby the crop was entirely lost, it was held that the proper measure of damages was the hire of the negro paid in advance, the rent of the land and the expenses incurred for the purpose of making the crop.<sup>4</sup>

§ 56. **Recovery for successive consequences.** Where the injury to be recovered for consists of several items, variously related consequentially to the alleged cause, the right to each must be decided upon the same principles as where only one inseparable injurious effect is in question. It may happen that such items are successive, and the first may in some sort operate as cause in respect to later effects. When this is the case a recovery for items subsequent to the first will depend on whether the act complained of is the efficient cause of the entire damage as represented by all such items, and whether they are consequences which ought reasonably to have been contemplated to ensue, or, in case of contract, whether they may fairly be supposed to have been within the contemplation of the parties at the time of contracting. This is well illustrated by an English case. The defendant contracted to deliver a threshing machine to the plaintiff, a farmer, within three weeks. It was the latter's practice, known to the de-

<sup>1</sup> *State v. Thomas*, 19 Mo. 613, 61 69 Ala. 373, 44 Am. Rep. 519. See ch. Am. Dec. 580; *Weeks v. Prescott*, 53 25.

Vt. 57, 74; *Braunsdorf v. Fellner*, 76 <sup>2</sup> *Tisdale v. Major*, 106 Iowa, 1, 75 N. W. Rep. 97; *Anderson v. Sloane*, 72 Wis. 566, 78 Am. St. 885, N. W. Rep. 663, citing this section.

<sup>3</sup> *Dewint v. Wiltse*, 9 Wend. 325. <sup>4</sup> *Hobbs v. Davis*, 30 Ga. 423.

fendant, to thresh his wheat in the field and send it thence direct to market. At the end of three weeks plaintiff's wheat was ready in the field for threshing, and, on his remonstrating at the delay in the delivery of the machine, the defendant several times assured him it should be sent forthwith. The plaintiff, having unsuccessfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterwards delivered and the contract price paid. The wheat was then threshed, and it was found necessary, owing to its deterioration by rain, to kiln-dry it. When dried and sent to market it sold for a less price than it would have fetched had it been threshed at the time fixed by the contract for the delivery of the machine, and then sold, the market price of wheat having meanwhile fallen. It was held, in an action for the non- [100] delivery of the machine, that the plaintiff was entitled to recover for the expense of stacking the wheat, the loss from the deterioration by the rain and the expense of kiln-drying it, but not for the loss by the fall in the market, the latter being too uncertain to have been contemplated and not the natural result of the breach.<sup>1</sup> There is much reason for holding that the latter loss was also recoverable.<sup>2</sup> The case referred to is much more satisfactory than a number of American cases which hold that a farmer cannot recover damages resulting to his crops from delayed delivery or the failure to work as warranted of a harvesting machine which was sold with knowledge that it was to be used in securing the purchaser's grain.<sup>3</sup>

**§ 57. Illustrations of the rule of the preceding section.**

In an action for negligent driving, whereby the plaintiff's horse was injured, it appeared that the horse was sent to a

<sup>1</sup> *Smreed v. Foord*, 1 E. & E. 602.

<sup>2</sup> *Ward v. New York Central R. Co.*, 47 N. Y. 29; *Sturgess v. Bissell*, 46 N. Y. 462; *Scott v. Boston, etc. Co.*, 106 Mass. 468; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Collard v. Southeastern R. Co.*, 7 H. & N. 79; *Weston v. Grand Trunk R. Co.*, 54 Me. 376, 92 Am. Dec. 552; *Peet v. Chicago, etc. R. Co.*, 20 Wis. 594, 91 Am. Dec. 446.

<sup>3</sup> *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Prosser v. Jones*, 41 Iowa, 674; *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. Rep. 153; *Osborne v. Poket*, 33 Minn. 10, 21 N. W. Rep. 752; *Brayton v. Chase*, 3 Wis. 456, probably overruled by cases referred to in *Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co.*, 62 id. 642, 650, 51 Am. Rep. 725, 22 N. W. Rep. 827.

farrier for six weeks for the purpose of being cured, and at the end of that time it was ascertained that it was damaged to the extent of 20%. It was held that the plaintiff was entitled to recover for the keep of the horse at the farrier's, the amount of the farrier's charges, and the difference in its value at the time of the accident and at the end of the six weeks, but not for the hire of another horse during that period.<sup>1</sup> Had a claim been made for the loss of the use of the injured horse during his treatment at the farrier's it would have been a proper item of damages.<sup>2</sup> If a horse and vehicle are injured through a defect in a highway and in consequence thereof the horse becomes frightened and unmanageable, continues to be a kicker and becomes spoiled for driving, there may be a recovery for the depreciation in his value as well as for the damage done the vehicle by the kicking and by the defect.<sup>3</sup> A tradesman took a ticket to go from L. to H. On arriving at an intermediate station he found no train ready to take him to H. the same night, as there should have been according to the published time-bill. He slept at that place and in the morning paid 1s. 4d. fare to H. In consequence of the delay he failed to keep appointments with his customers, and was detained for many days. The latter was deemed within the contemplation of the parties. The court told the jury that the plaintiff would [101] have been entitled to charge the company with the expense of getting to H., but he had no right to cast upon it the remote consequences of remaining the night at the intermediate place. He was entitled to the fare thence to H., and perhaps the 2s. for his bed and refreshments. A motion for a new trial on the ground of misdirection was refused. Pollock, C. B., said: "In actions for breach of contract the damages must be such as are capable of being appreciated or estimated. Mr. Wilde was invited at the trial to state what were the damages

<sup>1</sup> Hughes v. Quentin, 8 C. & P. 703; Clare v. Maynard, 7 C. & P. 741.

<sup>2</sup> Albert v. Bleecker Street, etc. R. Co., 2 Daly, 393; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Walrath v. Redfield, 11 Barb. 368; Gillett v. Western R. Co., 8 Allen, 560; The Glaucus, 1 Lowell, 366; Sweeney v. Port Burwell Harbor Co., 17 Up. Can. C. P. 574.

<sup>3</sup> English v. Missouri Pacific R. Co., 73 Mo. App. 232. See § 26.

One of the New York county courts has denied the right to recover for the depreciation in the value of a horse caused by fright. Nason v. West, 31 N. Y. Misc. 583, 65 N. Y. Supp. 651.

to which the plaintiff was entitled. He said general damages. The plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of the contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule that, generally, in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.”<sup>1</sup> A subsequent English case was decided by the queen’s bench in 1875 on this state of facts: The plaintiff, wife and two children of five and seven years old respectively, took tickets on the defendant’s railway from W. to H. by the midnight train. They got into the train but it did not go to H., but along another branch to E. where the party were compelled to get out. It being late at night the plaintiff was unable to get a conveyance or accommodation at an inn; and the party walked to his house, a distance of between four and five miles, where they arrived at about three o’clock in the morning. It was a drizzling night and the wife caught cold and was laid up for some time, and unable to assist her husband in his business as before, and expenses were incurred for medical attendance.<sup>2</sup> Three items of loss and injury came under consideration: first, the inconvenience, as it was called, of having to walk home; second, the expense of the wife’s sickness; and third, the loss of her services. The last two items being coincident in time [102] and relation to the defendant’s breach of contract were considered together. Only the first was allowed. It was remarked that the plaintiffs did their best to diminish the inconvenience to themselves, and they had no alternative but to walk; that it was not to be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendant’s contract to convey them to H. Cockburn, C. J., said: “I am at a loss to see why that inconvenience should not be

<sup>1</sup> Hamlin v. Great Northern R. Co., 1 H. & N. 408. <sup>2</sup> Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111. See Denton v. Same, 5 El. & Bl. 860.

compensated by damages in such an action as this. . . . If the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of contract, I can see no reasonable principle why it should not be compensated for." And again: "So far as the inconvenience of the walk is concerned, that must be taken to be reasonably within the contemplation of the parties; because if a carrier engages to put a person down at a given place and does not put him down there but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must go to the place of his destination somehow or other. If there are means of conveyance for getting there he may take those means and make the company responsible for the expense; but if there are no means I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the damage must be admitted to be a fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it." The objection to what is termed the "secondary consequence" is that it is not a consequence so certain to occur as to be among those to be anticipated from such a breach, it happening from other than the usual state of the weather; but it was not any more a secondary consequence than is the burning of a second building by a continuous fire, or the injury to the grain by [103] rain in *Smeed v. Foord*. It is said in the same opinion already quoted from that "the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may fairly be taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely

connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one I think who understood the law would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable." True, there the sickness would be the cause of an accidental loss, but in the case under discussion the question was not of such a loss. On the contrary it was the expense and loss of time incident to the sickness itself. Was not that "a result of the breach" which was natural and proximate, and to be contemplated under the other circumstances of the breach for which the defendant was held responsible?<sup>1</sup>

<sup>1</sup> Blackburn, J.: "It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher instead of Hampton Court. The contract was to supply a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or, if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. . . . When he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that which

the learned judge gave to the jury here, namely, that the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage." As to damages being recoverable for the illness of his wife, he said: "I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation, and therefore I agree with what my lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man, when making a contract, would contemplate would flow from a breach of it. For my own

One who has been injured may recover for the injury though in his care of himself thereafter, he may have misjudged as to the proper treatment. In such an event he is not a volunteer in the case of his ailment; that was caused by the defendant, and the plaintiff's honest misjudgment is not negligence. The negligence of the defendant began a sequence of harmful effects; an intervening innocently misjudged act of the injured person aggravated them; but the latter act would have been harmless if the original wrong were not still operative. It continues to operate more harshly, and it is from such operation that the plaintiff suffers. The original cause continues, and accomplishes the whole result.<sup>1</sup>

[104] § 58. **Same subject.** In an action under the code it appeared that the defendant delivered tickets to the plaintiff about the 1st of March, 1852, for transportation from New York to San Francisco; one entitled him to a passage to Graytown, at the mouth of Nicaragua river, in a specified ship which was to sail on the 5th of that month; another entitled him to a passage up that river and through the lake of that name to San Juan del Sur, on the Pacific ocean; and the other from the latter place to his destination, on a steamer named, which

part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night or day; but on the question now before the court, though you cannot draw the precise line, you can say on which side the line the case is." Mellor, J.: "I quite agree . . . that for the mere inconvenience, such as annoyance and loss of temper or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot have damages. That is surely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I must say, if it is a fact that you arrived at a

place where you did not intend to go to, where you are placed by reason of the breach of contract of the carriers at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home, and charge expenses to the defendant. The reason why you may hire a carriage and charge the expense to the company is with a view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial, arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience."

<sup>1</sup> Hope v. Troy & L. R. Co., 40 Hun, 438, affirmed without opinion, 110 N. Y. 643.



was advertised to leave about fifteen days after the plaintiff would arrive at the starting port according to the usual course of conveyances. The plaintiff was carried on his first [105] ticket, and arrived at Graytown March 15th, where he was detained eleven days. He then started for San Juan del Sur. He arrived at a place on the way on the 31st of March when he was taken sick. There he received news that the steamer on which he was entitled to take passage under his third ticket was lost on the 27th of the previous month, but the fact was not known to the defendant at the time of selling the tickets nor until about the 20th of April. The plaintiff arrived at San Juan del Sur on the 4th of April and remained there until the 9th of May, endeavoring, but unsuccessfully, to procure a passage to San Francisco. He then returned to New York, and remained sick, until long after he returned home, with a fever peculiar to the climate of Nicaragua. It was held that the time he lost by reason of his detention on the isthmus, his expenses there, and of his return to New York, the time he lost by reason of his sickness after he returned home and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence and breach of duty, as well as the amount originally paid for his passage, were damages which the plaintiff was entitled to recover.<sup>1</sup>

The damages which are recoverable for breach of contract are limited to the direct and immediate consequences; but the right to indemnity is not satisfied by compensation for the first item of loss if there are others so identified with it that the injury as a whole naturally comprehends all and they together constitute the immediate consequence. A party whose breach of contract leaves the other party in such a situation that sickness is its natural, immediate and probable consequence causes by the same act the direct pecuniary losses which are its usual and natural concomitants, as loss of time and the expense of medical and other attendance. If by reason of the sickness some extraordinary or unusual loss occurs for want of ability on his part to attend to his affairs it is a loss which can-

<sup>1</sup> Williams v. Vanderbilt, 28 N. Y. v. Pacific Mail S. S. Co., 1 Cal. 353; 217, 84 Am. Dec. 333; Heirn v. Mc-Pearson v. Duane, 4 Wall. 605; The Caughan, 32 Miss. 17; Porter v. Steam-Zenobia, 1 Abb. Adm. 80; The Cana-boat New England, 17 Mo. 290; Yonge-dian, 1 Brown Adm. 11.

not be considered as having entered into the contemplation of [106] the parties; and the same must be the conclusion, if the sickness were not the natural and probable consequence of the act complained of, but the result of some other or secondary cause. Where sickness is the direct or proximate consequence of a wrongful act, the pain and suffering are also elements of the injury for which compensation may be recovered.<sup>1</sup>

The earlier cases, especially in jurisdictions in which exemplary damages are recoverable, generally held that the person whose breach of contract, fraud or other wrongful act causes another to be sued, under such circumstances that the suit is an injurious consequence for which he is liable, is bound to respond in damages for the expenses which are the necessary and legal incidents of the suit.<sup>2</sup> But not in the absence of such circumstances.<sup>3</sup> As given in a late case, the reason for denying counsel fees where the circumstances do not warrant the imposition of exemplary damages is that the law prescribes what costs shall be taxed and what shall be therein in-

<sup>1</sup> Fillebrown v. Hoar, 124 Mass. 580; Meagher v. Driscoll, 99 Mass. 281; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229; Ward v. Vanderbilt, 4 Abb. App. Dec. 521; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; Klein v. Jewett, 26 N. J., Eq. 474; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Ohio, etc. R. Co. v. Dickerson, 59 Ind. 317; Whalen v. St. Louis, etc. R. Co., 60 Mo. 323; Pittsburg, etc. R. Co. v. Andrews, 39 Md. 329; Johnson v. Wells, etc. Co., 6 Nev. 224, 3 Am. Rep. 245. See §§ 1242-1245.

<sup>2</sup> Philpot v. Taylor, 75 Ill. 309, 20 Am. Rep. 241; Dixon v. Fawcus, 3 El. & El. 537; Collen v. Wright, 7 El. & B. 301; Randell v. Trimen, 18 C. B. 786; Anderson v. Sloane, 72 Wis. 566, 7 Am. St. 885, 40 N. W. Rep. 214; Stevens v. Handley, Wright, 121; Roberts v. Mason, 10 Ohio St. 277; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Parsons v. Harper, 16 Gratt. 64; Marshall v. Betner, 17 Ala. 832; Lawrence v. Hagerman, 56 Ill. 68; 8

Am. Rep. 674; Ziegler v. Powell, 54 Ind. 173; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Eastin v. Bank of Stockton, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. Rep. 1106; Magmer v. Renk, 65 Wis. 364, 27 N. W. Rep. 26; Gregory v. Chambers, 78 Mo. 294; Bolton v. Vellines, 94 Va. 793, 26 S. E. Rep. 847; First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. Rep. 744; Stevenson v. Whitesell, 10 Pa. Super. Ct. 306; Winkler v. Roeder, 23 Neb. 706, 37 N. W. Rep. 607, 8 Am. St. 155.

<sup>3</sup> Burruss v. Hines, 94 Va. 413, 26 S. E. Rep. 875; St. Peter's Church v. Beach, 26 Conn. 355; Henry v. Davis, 123 Mass. 345; Warren v. Cole, 15 Mich. 265; Young v. Courtney, 13 La. Ann. 193; Flanders v. Tweed, 15 Wall. 450; Oelrichs v. Spain, 13 How. 363; Yarbrough v. Weaver, 7 Tex. Civ. App. 215, 25 S. W. Rep. 468; Landa v. Obert, 45 Tex. 542; Winstead v. Hulme, 32 Kan. 568, 4 Pac. Rep. 994; Bull v. Keenan, 100 Iowa, 144, 69 N. W. Rep. 433; Gibney v. Lewis, 63 Conn. 392, 36 Atl. Rep. 799.

cluded as the fee of the successful party. In such case no greater fee should be allowed to be recovered. The litigants should be placed on an equality. If the defendant should be successful it is clear that he cannot recover from the plaintiff, in addition to the taxable costs, the fee paid by him to his attorney; nor should the plaintiff, if successful, recover from the defendant the fee he may have paid or become liable for to his attorney.<sup>1</sup> Counsel fees paid in the conduct of an unsuccessful suit against lot-owners to recover the amount of an assessment assigned by a city to such party in payment for the construction of a sewer, which suit failed because the assessment was invalid, are not recoverable in an action subsequently brought against the city for damages for the violation of its contract though the city had stipulated that the assessment should be valid.<sup>2</sup> The weight of authority is to the effect that counsel fees and court costs made necessary in the prosecution or defense of suits occasioned by the breach of contracts are not recoverable in actions *ex contractu*. There are some exceptions, such as actions on injunction,<sup>3</sup> and attachment bonds,<sup>4</sup> and the like, and actions on covenants of warranty or of seizin,<sup>5</sup> where there has been an eviction reasonably resisted by the grantee. "Expenditures of this class, though growing

<sup>1</sup> *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875.

A recovery of attorney's fees has been denied in an action by a stockholder to compel the officers of a corporation to allow an inspection of its books. *Clason v. Nassau Ferry Co.*, 20 N. Y. Misc. 315, 45 N. Y. Supp. 675. And in an action against an executor *de son tort* for wrongfully withholding property and resisting proceedings to punish him for contempt. *Bishop v. Hendrick*, 82 Hun, 323, 31 N. Y. Supp. 502, 146 N. Y. 398, 42 N. E. Rep. 542. And against the usurper of an office. *Palmer v. Darby*, 2 Ohio, N. P. 416, 1 Ohio Dec. 48.

A plaintiff can recover attorney's fees as damages only when permitted by statute. *Spencer v. Murphy*, 6 Colo. App. 453, 41 Pac. Rep. 841.

One who has succeeded in an action cannot recover in a subsequent action the expense of the first. *Lowell v. House of Good Shepherd*, 14 Wash. 211, 44 Pac. Rep. 253; *Marvin v. Prentice*, 94 N. Y. 295.

Where provision is made by statute for a reasonable attorney's fee to be fixed by the court, and the court makes an allowance, it is error to allow in addition the statutory fee provided for the successful party as part of the costs. *Montesano v. Blair*, 12 Wash. 188, 40 Pac. Rep. 731.

<sup>2</sup> *Gates v. Toledo*, 57 Ohio St. 105, 48 N. E. Rep. 500.

<sup>3</sup> See § 524.

<sup>4</sup> See § 512.

<sup>5</sup> See §§ 617-619; also §§ 83, 84.

out of the alleged breach, in the sense that had there been no breach the occasion for them would not have arisen, are yet too remote to have been in the contemplation of the parties, and hence do not constitute an element of legal damage when the suit is on the contract, though the rule might be otherwise were it in case, setting out the contract as inducement merely.<sup>1</sup>

If one's property is taken, injured or put in jeopardy by another's neglect of duty imposed by contract, or by his wrongful act, any necessary expense incurred for its recovery, repair or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages; and if it is judicious and made in good faith, it is recoverable though abortive.<sup>2</sup>

**§ 59. Required certainty of anticipated profits.** In another class of cases the question of the *certainty of damages* is more distinctly involved. They are cases in which the act complained of is plainly actionable and easy of proof, and the actual injury occasioned thereby consists in destroying or impairing arrangements from which it is alleged that pecuniary advantages would have resulted. Such effects may be produced by the refusal of a party to fulfill his contract, or by tortious acts by which some business scheme is frustrated. The pecuniary advantages which would have been realized but for the defendant's act must often be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty<sup>3</sup> that such advantages would have re-

<sup>1</sup>Burton v. Henry, 90 Ala. 281, 7 So. Rep. 925; Marvin v. Prentice, 94 N. Y. 295; Copeland v. Cunningham, 63 Ala. 394.

<sup>2</sup>Nading v. Dennison, 22 Tex. Civ. App. 173, 54 S. W. Rep. 412, quoting the text; Nashville v. Sutherland, 94 Tenn. 356, 29 S. W. Rep. 228; Watson v. Lisbon Bridge, 14 Me. 201; Hughes v. Quentin, 8 C. & P. 703; Gillet v. Western R. Co., 8 Allen, 560; Emery v. Lowell, 109 Mass. 197; Hoffman v. Union Ferry Co., 68 N. Y. 385; Jutte v. Hughes, 67 N. Y. 268; Loker v. Damon, 17 Pick. 284; Ham-

lin v. Great Northern R. Co., 1 H. & N. 408; Mailler v. Express Propeller Line, 61 N. Y. 312; Smeed v. Foord, 1 E. & E. 602; Clark v. Russell, 110 Mass. 133; James v. Hodsdon, 47 Vt. 127; First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. Rep. 744, quoting the text. See § 88.

<sup>3</sup>"The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to

sulted, and, therefore, that the act complained of prevented them.<sup>1</sup>

The grounds upon which is founded the general rule of excluding profits in estimating damages are, (1) that in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote and not the direct and immediate result of a non-fulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties. Cases arise, however, in which loss of profits is said to be clearly within the contemplation of the parties, although not provided for by the terms of the contract, and where such profits are not open to the objection of uncertainty or remoteness. An instance of the latter kind is where the contract is entered into for the purpose, in part at least, of enabling the party to fulfill a collateral agreement from which profits would arise, of the existence of which he informed the other party prior to the making of the contract. In such cases the loss of profits from the collateral agreement is clearly within the contemplation of the parties, and is not remote or speculative.<sup>2</sup>

whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result but uncertain in amount." In the latter case the law will adopt that mode of estimating the damages which is most certain and definite. *Blagen v. Thompson*, 23 Ore. 239, 254, 18 L. R. A. 315, 31 Pac. Rep. 647.

"Certainty" means reasonable certainty. *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. Rep. 964; *Stewart v. Patton*, 65 Mo. App. 21.

<sup>1</sup> *Myerle v. United States*, 33 Ct. of Cls. 1, 26, quoting the text; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. Rep. 474. See § 78.

In actions to recover for personal injuries which disqualify the person

injured from giving attention to the business in which he is engaged, it is error to receive testimony of the average profits made therein as a basis for estimating damages. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. Rep. 514; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Blair v. Milwaukee*, etc. R. Co., 20 Wis. 262. This rule is disapproved of in *Terre Haute v. Hudnut*, 112 Ind. 542, 552, 13 N. E. Rep. 686, and the New York case cited pronounced not in harmony with later cases in that state. See *Wakeman v. Wheeler & W. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. Rep. 264; § 1246.

<sup>2</sup> Per Parker, Ch. J., in *Witherbee v. Meyer*, 155 N. Y. 446, 453, 50 N. E. Rep. 85.

If a vendor fails to deliver property pursuant to his contract, the vendee, having paid for it, is deprived of such benefit as such sale completed would have conferred, which is a loss equal to the value of the property at the time it should have been delivered, with interest from that time. This value can generally be proved with certainty. If the property has not been paid for, the compensation is still adjusted with reference to the value, and is the difference between the contract price and the value. Thus, the vendee is entitled to recover according to the advantage he would have derived from performance of the contract, namely, the profit he could have made by the bargain. He is entitled to such sum as would enable him to obtain the property if it is obtainable.<sup>1</sup> On the other hand, where a vendee breaks his contract, the property is left on the [108] vendor's hands; his loss is equal to the difference between the contract price and any less sum the property is worth when the vendee was bound to take and pay for it. The loss he suffers is the profit he would have made by the completion of the sale.<sup>2</sup>

<sup>1</sup> In *Haskell v. Hunter*, 23 Mich. 305, an action was brought for damages for breach of a contract to sell and deliver lumber, and it appeared that a portion of the lumber had been delivered to the plaintiffs at a place other than that specified in the contract, and subject to a heavy bill of freight in consequence thereof. In the absence of any proof that the plaintiffs had accepted the same in satisfaction to that extent of the contract, or had waived their right to compensation to that extent for the breach thereof, it was not proper to deduct the amount so delivered from the whole amount to be delivered. An instruction to the jury that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery was held to be erroneous. The true measure is the difference between the contract

price and what it would have cost the plaintiffs to procure, at the place of delivery, and at the time or times when it was reasonable and proper for them to supply themselves with lumber of the kind and quality they were to receive on the contract; and if it were impracticable to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants.

<sup>2</sup> *Gordon v. Norris*, 49 N. H. 376; *Haines v. Tucker*, 50 N. H. 307; *Collins v. Delaporte*, 115 Mass. 159; *Ullman v. Kent*, 60 Ill. 271; *Sanborn v. Benedict*, 78 Ill. 310; *Camp v. Hamlin*, 55 Ga. 259; *McCracken v. Webb*, 36 Iowa, 551; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Beardsley v. Smith*, 61 Ill. App. 340.

The loss of profits based upon the sale of town lots at prices beyond their value and which are dependent upon the working up of a boom can-

**§ 60. Same subject.** In many cases the sum which shall represent the value to a vendee who has been disappointed in the receipt of property bargained for cannot be ascertained from proof of a market value, either because the article is not obtainable in market or because it is contracted for and must be obtained from the vendor to answer a particular purpose, and not for resale. Then, in applying the general rule that the damages for breach of contract are to be measured by the benefits which would have been received if the contract had been performed, resort must be had to the known or customary use of the property and such practical elements of value as the case presents. If the sale is made with a warranty, express or implied, that the article is of a particular description or suitable for a designated use, on a breach by the vendor the damages are properly computed according to the actual loss in respect to that object. The ascertainment of the damages may involve an inquiry into the advantages derivable from the delivery of articles of the required description or suitable for the contemplated use, and of losses occasioned by the breach with reference to the particular purpose of the contract as known to the parties. In such cases the same degree of certainty is not always attainable and there is much conflict of authority as to the proper scope of inquiry. The same considerations apply to the question of the proper mode of arriving at the amount of damage whatever be the nature of the contract. The injured party is entitled to gains prevented and losses sustained if he can prove them with sufficient certainty.<sup>1</sup> In *Fletcher v. Tayleur*<sup>2</sup> the action was brought

not be recovered. *Carbondale Investment Co. v. Burdick*, 58 Kan. 517, 50 Pac. Rep. 442.

<sup>1</sup>*Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. Rep. 492; *Arkansas Valley Town & Land Co. v. Lincoln*, 56 Kan. 145, 42 Pac. Rep. 706; *New Market Co. v. Embury*, 20 Ky. L. Rep. 1130, 48 S. W. Rep. 980; *Washington County Water Co. v. Garver*, 91 Md. 398, 46 Atl. Rep. 979; *Wiggins Ferry Co. v. Chicago &*

*A. R. Co.*, 128 Mo. 224, 27 S. W. Rep. 568; *Stewart v. Patton*, 65 Mo. App. 21; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. Rep. 842, 59 Neb. 203, 80 N. W. Rep. 824; *Lakeside Paper Co. v. State*, 45 App. Div. 112, 60 N. Y. Supp. 1081; *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *Carroll-Porter Boiler & Tank Co. v. Columbus Machine Co.*, 5 C. C. A. 190, 55 Fed. Rep. 451; *Hitchcock v. Anthony*, 28 C. C. A. 80, 83 Fed. Rep.

against a ship-builder to recover damages for non-delivery of an iron ship at the time appointed in the contract. The ship [109] was intended by the plaintiffs and from the nature of her fittings the defendant must have known she was intended for

779; *Safety Insulated Wire & Cable Co. v. Mayor*, 13 C. C. A. 375, 66 Fed. Rep. 140; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. Rep. 1015; *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219, 62 S. W. Rep. 591.

In an action brought to recover the price of nine and one-half tons of fertilizer the defendant set up that the plaintiff agreed to sell and deliver to him twenty tons of fertilizer at a stipulated price, with notice that it was intended for use on the defendant's cotton crop. The defendant was unable to buy the remaining quantity elsewhere, and the plaintiff refused to deliver it. The land upon which the fertilizer was designed to be used was cultivated in a farmer-like manner. Upon a portion the fertilizer delivered was used. This portion produced between three hundred and four hundred pounds of seed cotton per acre more than that adjoining, which was also planted in cotton — the quality and cultivation of each part being precisely the same. The court say: "The true rule seems to be that [the loss of] profits which have been sustained as the natural consequence of the breach or the wrongful act complained of are recoverable unless they are objectionable either on the ground of remoteness or of uncertainty. Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent upon collateral engagements and enterprises not brought to the notice of the contracting parties, and not therefore brought within their contemplation or that of the law. Those are considered uncertain which are

purely speculative in their nature, and depend upon so many incalculable contingencies as to make it impracticable to determine them definitely by any trustworthy mode of computation. We would not be willing to say that the damages here claimed by the defendant by way of lost profits would have been recoverable if their ascertainment had been left to mere conjecture. The amount of cotton or other crops which land produces is dependent upon so many varying contingencies as to render it very indeterminate. It will vary with the seasons, the adaptation of soil and climate, and its comparative exemption from the ravages of worms or other destructive insects. Speculative opinions of witnesses as to the probable influences of these operative causes would be a poor criterion for the measure of values. In this case, however, these difficulties are entirely removed. The character of the season is absolutely known. So is the precise effect of the fertilizer used during this particular season. No speculation is needed as to how much rain and how much sunshine were requisite to produce a given amount of crops to the acre, nor as to the probable effect of the fertilizer upon the different kinds of soil, or even the proportion of it best suited to the land, and, therefore, what would necessarily have been produced on the remainder, which is shown to have been in precisely the same state of cultivation, and similar in quality of soil." *Bell v. Reynolds*, 73 Ala. 511. See *Goodsell v. Western U. Tel. Co.*, 53 N. Y. Super. Ct. 46, 58 id. 26, 9 N. Y. Supp. 425.



a passenger ship in the Australian trade. The witnesses called on the part of the plaintiff stated that the vessel would, in all probability, have obtained, if completed by the time mentioned in the contract, at the then current rates, an outward freight of about 7,000*l.*, and a gross freight home of about 9,500*l.*, and that, allowing for the necessary outlay and expenses, the profits would in all probability have been a sum somewhat exceeding 7,000*l.* The amount of freight received by the plaintiffs when the ship sailed was 4,280*l.* The court submitted the case to the jury, to be decided by the rule laid down in *Hadley v. Baxendale*, and the jury returned a verdict in favor of the plaintiffs for 2,750*l.*, which was sustained. Under the particular circumstances it is to be inferred that the *data* for ascertaining what the ship would have earned if she had been finished at the proper time were not purely conjectural, but were nearly as reliable as is the proof of market values.

But while this case on its facts is quite satisfactory and no doubtful principles are announced in it, the damages were arrived at in a manner which the courts in this country have generally refused to adopt; that is, where there is any other and more certain method of ascertaining the damages they will not generally attempt to ascertain what profits could be realized by conducting a business.<sup>1</sup> In actions for damages for not fulfilling in time contracts for particular works to be completed at a stipulated date, the plaintiff cannot recover damages estimated on the value of profits which would have been realized by the use of the works if the contract had been performed. The value of such use for general purposes to which they are adapted or some known use for which they were intended, during the delay, with any expenses which have to be

<sup>1</sup> *Taylor v. Maguire*, 12 Mo. 313; *Blanchard v. Ely*, 21 Wend. 342; *Walker v. Ellis*, 1 Sneed, 515; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *Singer v. Farnsworth*, 2 Ind. 597; *Glidden v. Pooler*, 50 Ill. App. 36; *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. Rep. 1036; *Delp v. Edlis*, 190 Pa. 25, 42 Atl. Rep. 462; *Sharpe v. Southern R. Co.*, 130 N. C. 613, 41 S. E. Rep. 799; *Douglas v. Railroad Co.*, 51 W. Va. 523, 41 S. E. Rep. 911; *Central Coal & Coke Co. v. Hartman*, 111 Fed. Rep. 96, 49 C. C. A. 244; *Armistead v. Shreveport, etc. R. Co.*, — La. —, 32 So. Rep. 456; *Asher v. Stacey*, 23 Ky. L. Rep. 1586, 65 S. W. Rep. 603; *Silurian Mineral Spring Co. v. Kuhn*, — Neb. —, 91 N. W. Rep. 508.

incurred in the meantime, is usually the measure of damages.<sup>1</sup> Where the plaintiff took possession of a store under a contract of purchase and carried on a profitable business in it for several months and was then ejected by the defendant and kept out of possession, the latter was liable for the value of the business lost, which was provable by evidence of the profits made.<sup>2</sup> On the breach of a contract for the loan of money to be used in erecting houses, none of which were built until three years after its breach, there cannot be a recovery for the loss of their rental value. The fact that the plaintiff was unable during that time to borrow the money from any other source on the same security offered the defendant, and which he did not impair, was taken as evidence of the uncertainty and speculative character of the anticipated profits.<sup>3</sup>

[110] In particular cases there may be losses in outlays made by the injured party in anticipation of the performance by the other party, and actual loss of wages of men kept idle, and various other like items which are easily proved; these, with the rental value of the agreed structure, enable the court to ascertain the damages with more certainty than by consideration of profits to be made in conducting a business where nearly all the factors in the calculation are supposititious.<sup>4</sup> But

<sup>1</sup> Griffin v. Colver, 16 N. Y. 489; Taylor v. Bradley, 39 N. Y. 129; McBoyle v. Reeder, 1 Ired. 607; Benton v. Fay, 64 Ill. 417; Green v. Mann, 11 Ill. 614; Priestly v. Northern I. & C. R. Co., 26 Ill. 207, 71 Am. Dec. 369; Strawn v. Cogswell, 23 Ill. 461; Fleming v. Beck, 48 Pa. 309; Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534; Green v. Williams, 45 Ill. 206; Dean v. White, 5 Iowa, 266; Rogers v. Beard, 36 Barb. 31; Snell v. Cottingham, 72 Ill. 161; Cassidy v. Le Fevre, 45 N. Y. 562; Parker v. Gilliam, 1 Ired. 545; Lecroy v. Wiggins, 31 Ala. 13; Pettee v. Tennessee Manuf. Co., 1 Sneed, 381; Heard v. Holman, 19 C. B. (N. S.) 1; Davis v. Cincinnati, etc. R. Co., 1 Disney, 23; Blair v. Kilpatrick, 40 Ind. 312; Thompson v. Shattuck, 2 Met. 615; Corbet v. Johnson, 10 Ont. App. 564; Bridges v. Lan-

ham, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. Rep. 704; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. Rep. 85; Rogers v. Bemus, 69 Pa. 432; Pennypacker v. Jones, 106 Pa. 237; Finnegan v. Allen, 60 Ill. App. 354; Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 54 Am. St. 598, 44 Pac. Rep. 621; Williams v. Island City Milling Co., 25 Ore. 573, 37 Pac. Rep. 49, citing the text; Watson v. Kirby, 112 Ala. 436, 20 So. Rep. 624; Atlantic & D. R. Co. v. Delaware Construction Co., 98 Va. 503, 37 S. E. Rep. 13; Sharpe v. Southern R. Co., 130 N. C. 613, 41 S. E. Rep. 799.

<sup>2</sup> Collins v. Lavelle, 19 R. I. 45, 31 Atl. Rep. 434.

<sup>3</sup> Levinski v. Middlesex Banking Co., 34 C. C. A. 452, 92 Fed. Rep. 449.

<sup>4</sup> Gates v. Northern Pacific R. Co., 64 Wis. 64, 24 N. W. Rep. 494; United

where there is not such a certain mode of estimating damages, the court will not dismiss the injured party with nominal damages, unless the case is such there is no certainty that he has suffered actual injury. In a suit by an agent against a life insurance company for damages resulting from his discharge during the term of his engagement, his measure of damages is the amount he has lost in consequence. And testimony of actuaries as to the probable value of renewals for the remainder of his term on policies already obtained is competent to assist in arriving at the result.<sup>1</sup> But an estimate of the probable earnings thereafter, derived from proof of the amount of his collections and commissions before the breach, without other proof relating thereto, was held too speculative to be admissible.<sup>2</sup>

In estimating the damages sustained by a company for the laying out of a highway across its railroad or for permitting another railroad to cross it at grade, the jury have no right to take into consideration any supposed future damage to it, from a probable increase in the expense of doing business in consequence of the establishment of the new highway or crossing; and evidence of payments of money on account of accidents at the several crossings, and of the comparative profit of travel over the railroad between different stations, is inadmissible; it is too uncertain and contingent.<sup>3</sup> The conjectural or possible profits of a whaling or other voyage cannot be taken into consideration in estimating the damage against a master for running away with the vessel and abandoning the voyage.<sup>4</sup>

*States v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Taylor Manuf. Co. v. Hatcher Manuf. Co.*, 39 Fed. Rep. 440; *Mandia v. McMahon*, 17 Ont. App. 34; cases cited in n. 1, p. 192.

The right to be reimbursed for outlay and expenses does not depend upon proof of the right to recover profits. *United States v. Behan*, *Taylor Manuf. Co. v. Hatcher Manuf. Co.*, *supra*.

<sup>1</sup> *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Tilles v. Mutual L. Ins. Co.*, 1 Mart. Ch. Dec. 313. See § 69.

<sup>2</sup> *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

<sup>3</sup> *Boston, etc. R. Co. v. Middlesex*, 1 Allen, 324; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670; *Massachusetts, etc. R. Co. v. Boston, etc. R. Co.*, 121 Mass. 124; *Chicago & A. R. Co. v. Joliet, etc. R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Boston & M. R. Co. v. County Com'rs*, 79 Me. 386, 10 Atl. Rep. 113. See § 1077 *et seq.*

<sup>4</sup> *Brown v. Smith*, 12 Cush. 366; *Schooner Lively*, 1 Gall. 314; *Boyd v. Brown*, 17 Pick. 453; *The Anna Maria*,

Where there was a breach of a contract to give a theatrical performance on one occasion only, proof of the leading actor's repute and popularity, that during the previous year he had played to a large house in the same place, the inhabitants of which largely patronized such performances, and the testimony of the plaintiff, based upon experience in the management of the theater in which the play was to have been rendered, of the cash receipts of similar plays given there, as to what the receipts might have been if the play had been given, was insufficient to sustain a judgment for substantial damages.<sup>1</sup> And where the breach was of a theatrical "sharing terms" agreement, which contemplated a considerable period for its execution, the loss of profits was not shown by the previous receipts of the plaintiff's theater and by proof of the success of the play, which was to have been given therein, in other cities.<sup>2</sup> The damages which will result from a contemplated advance in the price of real estate because of the proposed erection and operation of a factory on adjoining land cannot be recovered in an action for the breach of a contract for the erection and operation thereof.<sup>3</sup> But if lands are exchanged with an agreement as part of the consideration by one of the parties that he will make valuable improvements upon the tract conveyed by him, the damages resulting from his breach are not too uncertain if the complaint alleges the difference between the value of the tracts at the time the exchange was made.<sup>4</sup> In a Wisconsin case there was a breach of contract to purchase and work a stone quarry, of which the plaintiff was to have one-half of the net profits so long as it could be profitably worked. The defendant refused to perform before any profits were realized. It was proven that the quarry had been worked at a profit for three years preceding the trial, and an estimate was made of profits based in part on earnings for another year. The court considered the loss of profits sufficiently established, and held

<sup>2</sup> Wheat. 327; *Del Col v. Arnold*, 3 Dall. 333.

<sup>1</sup> *Todd v. Keene*, 167 Mass. 157, 45 N. E. Rep. 81.

<sup>2</sup> *Moss v. Tompkins*, 69 Hun, 288, 23 N. Y. Supp. 623, affirmed without opinion, 144 N. Y. 659; approved in

*Cutting v. Miner*, 30 App. Div. 457, 53 N. Y. Supp. 288, which see.

<sup>3</sup> *Dullea v. Taylor*, 35 Up. Can. Q. B. 395; *Rockford, etc. R. Co. v. Beckemeier*, 72 Ill. 267; *Waterson v. Alleghany Valley R. Co.*, 74 Pa. 208.

<sup>4</sup> *Wilson v. Yocum*, 77 Iowa, 569, 42 N. W. Rep. 446.

that the time during which a recovery might be had therefor was for the jury.<sup>1</sup>

§ 61. **Warranties of seeds and breeding quality of animals, etc.** Where a vendor falsely warranted that seed sold would produce Bristol cabbages the damages recoverable were the value of a crop of Bristol cabbages such as would ordinarily have been produced that year, deducting the expense of raising it and the value of the crop actually raised.<sup>2</sup> What would have been produced from other seed and of the kind warranted, of course, could not be proved directly, and it was not attempted; but the regularity of production under usual conditions is such that a judicial conclusion may be based upon it as sufficiently certain. Mere speculative profits, such as might be conjectured would be the probable result of an adventure defeated by the breach of contract, the gains from which are entirely conjectural and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of damages recoverable. In Georgia the rule is that for the breach of an implied warranty of the merchantable quality of seed for planting the damages are limited to the purchase-money with interest thereon and expenses incurred in planting and preparing for the planting of the seed.<sup>3</sup> In Tennessee only the difference in value between the seed purchased and that delivered can be recovered.<sup>4</sup> The cardinal rule in relation to the damages to be compensated on the breach of a contract is that the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to estimate the extent of his injury; this will exclude all such elements of damage as are incapable of being ascertained by the usual rules of evidence to a reason-

<sup>1</sup> Treat v. Hiles, 81 Wis. 280, 50 N. W. Rep. 896, approved in Hitchcock v. Supreme Tent Knights of Macca-bees, 100 Mich. 40, 58 N. W. Rep. 640, and in Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. Rep. 785.

<sup>2</sup> Passinger v. Thorburn, 34 N. Y. 634; Wolcott v. Mount, 36 N. J. L. 262, 18 Am. Rep. 438; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; White v. Miller, 71 N. Y. 133; Ferris v. Comstock, 33 Conn. 513; Page v.

Pavey, 8 C. & P. 769; Randall v. Raper, 96 Eng. C. L. 82; Flick v. Weatherbee, 20 Wis. 392; Wagstaff v. Short Horn Dairy Co., 1 Cab. & E. 324; Phelps v. Eyria Milling Co., 12 Ohio Dec. 692, quoting the text. See Reiger v. Worth, 127 N. C. 230, 37 S. E. Rep. 217, 52 L. R. A. 362.

<sup>3</sup> Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508.

<sup>4</sup> Hurley v. Buchi, 10 Lea, 346.

[112] able degree of certainty.<sup>1</sup> Instances of such uncertain damages are profits expected from a whaling voyage and the gains which depend in a great measure upon chance; they are too purely conjectural to be capable of entering into compensation for non-performance of a contract.<sup>2</sup> For a similar reason the loss of the value of a crop for which seed had been sown, the yield of which would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with the degree of certainty which the law exacts in the proof of damages.<sup>3</sup> The loss of profits following the breach of a contract to publish an advertisement have been held to be incapable of being estimated;<sup>4</sup> a conclusion which has been denied in a recent English case.<sup>5</sup> The damages re-

<sup>1</sup> *Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28, quoting the text; *Hair v. Barnes*, 26 Ill. App. 580.

<sup>2</sup> *Wolcott v. Mount*, *supra*.

<sup>3</sup> Injuries done to growing crops must be estimated with reference to their condition at the time they are inflicted. Their value cannot be proven by showing the worth of similar crops which matured. *Drake v. Chicago, etc. R. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. Rep. 215; *Sabine, etc. R. Co. v. Joachim*, 58 Tex. 456; *Texas, etc. R. Co. v. Young*, 60 id. 201; *G., C. & S. F. R. v. Holliday*, 65 id. 512; *Jones v. George*, 61 id. 345, 48 Am. Rep. 280, 56 Tex. 149; *Gresham v. Taylor*, 51 Ala. 505. *Contra*, *Payne v. Railroad, etc. Co.*, 38 La. Ann. 164, 168, 58 Am. Rep. 174.

And on account of the uncertainty involved in the maturing of crops the "damage sustained by injuries done thereto cannot be reduced by efforts to show what might have been realized if another crop had been planted on the land on which that injured was growing. *G., C. & S. F. R. v. Holliday*, *supra*.

<sup>4</sup> *Tribune Co. v. Bradshaw*, 20 Ill. App. 1.

The damages for the breach of an agreement to advertise certain remedies over the name of a druggist who gives an order for such remedies are too speculative to permit of a recovery. *Stevens v. Gale*, 113 Mich. 680, 72 N. W. Rep. 5.

<sup>5</sup> The plaintiff, on beginning business as a ladies' tailor, made a contract with the defendant for the insertion of an advertisement in a special place in a newspaper. The publication was made for only a part of the stipulated time. The jury was instructed as to the measure of damages according to the rule of *Hadley v. Baxendale*, and returned a verdict for substantial damages. *Kennedy, J.*, said: The defendant knew the object of the advertisement. If it be material, I think he ought to be taken to have known at the time that if he broke the contract the result would be, as a natural consequence, loss to the plaintiff in his business. The plaintiff said he suffered loss to the extent of £100, which he attributed to the loss of the advertisement. No suggestion was made by the defendant as to any other cause for the loss of business. The defendant knew that the plaintiff could not get the adver-

sulting from the breach of a warranty of the breeding qualities of an animal are too contingent and uncertain to support a recovery when compensation for the services he renders is to be paid only when the animals served actually foal.<sup>1</sup> The same is true of the reduction of the number of members in a given class in a mutual benefit society, the effect being that the amount realized by the beneficiary under a certificate is thereby lessened. What the result would have been if the change which brought about such reduction had not been made is a mere matter of speculation.<sup>2</sup> But if a vessel is under charter or engaged in a trade the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sown and the ground prepared for cultivation, and the complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character.<sup>3</sup>

**§ 62. Prospective growth of orchard and of animals.** An instructive case arose in Ohio involving this question of uncertainty.<sup>4</sup> The action was on a contract by which the de-

tisement inserted in a journal of such unique position in such a place as he had contracted to give him. I am of opinion that the evidence of loss of business was proper for the consideration of the jury in assessing the damages. *Marcus v. Myers*, 11 T. L. Rep. 327 (1895).

Where there was a breach of a contract to permit a party to put up signs at drinking stations on the grounds of the Columbia exposition advertising a water filter, testimony of qualified witnesses giving opinions as to the value of the right under that contract was admissible. *World's Columbian Exposition Co. v. Pasteur-Chamberland Filter Co.*, 82 Ill. App. 94.

<sup>1</sup> *Connoble v. Clark*, 38 Mo. App. 476.

<sup>2</sup> *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 500, 20 N. E. Rep. 479, 3 L. R. A. 409.

<sup>3</sup> *Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438; *Owners of The Gracie v. Owners of The Argentino*, 14 App. Cas. 519, affirming *The Argentino*, 13 Prob. Div. 191; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, quoted from in note to preceding section.

<sup>4</sup> *Rhodes v. Baird*, 16 Ohio, 573. It is said of this case that if it goes so far as to hold that deprivation of future profits cannot be ground for damages, it is not in accord with the current of authority. See § 107. The case in which this observation was made ruled that evidence of the value of an orchard at the time of trial, in the prospective profits of which the plaintiff was interested, was admissible, and it was not to be presumed in favor of a wrong-doer that such value will become less. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. Rep. 62.

fendant agreed to make a lease to the plaintiff for the term of ten years of certain lands on which to plant and cultivate a peach orchard. The breach consisted in the failure to make a lease and in defendant causing the plaintiff, within two years from his taking possession, and after the peach trees were planted, to be evicted from the premises. On the trial the plaintiff was permitted to give evidence of the probable profits that might in the future be realized from the orchard, judging from the number of crops and the prices of peaches in the county for the last ten or fifteen years. This testimony was held by the appellate court to be incompetent, because too uncertain and speculative: "To the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value its value should have been ascertained from the witnesses [113] whose skill and experience enabled them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.<sup>1</sup> This would only be applying the same principle for ascertaining the value of property which, by reason of its limited use, had no market value, which is adopted with reference to proving the present worth of the future use of property which, by reason of its being in greater demand, has a market value. In the case of property of the former description, the range for obtaining testimony as to the value is, of course, more circumscribed than it is in the case of property of the latter description. But in either case the proving of the value of the property by witnesses having competent knowledge of the subject is more certain and direct than to undertake to do so by submitting to the jury, as grounds on which to make up their verdict, the supposed future profits. The profits testified to . . . were remote and contingent, depending on the character of the future seasons and markets, and a variety of other causes of no certain and uniform operation." Where the plaintiff sought to recover the value of his stock in a . . .

<sup>1</sup> Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 261; Newbrough v. Walker, 8 Gratt. 16, 56 Am. Dec. 127.



green-house, which was damaged or destroyed by a defective heating apparatus, he was permitted to show the value of the plants by testifying as to the number of flowers cut from them the year previous, he having had long experience in cultivating plants by artificial heat and knowing how many flowers could be produced from a plant.<sup>1</sup> The damages resulting from the failure to furnish an agreed number of steers to be cared for and sold at a profit, the plaintiff to be compensated for his services by a share of the profits resulting from their improvement in condition, are not too uncertain. In the absence of any agreement as to the weight or age of the steers it was assumed that they were such as were ordinarily purchased for feeding purposes in the community.<sup>2</sup>

**§ 63. Profits of special contracts.** The liability for the profits which would have resulted from the performance of a contract is co-extensive with the power to contract; and the government is liable therefor to the same extent as an individual.<sup>3</sup> The right of a party to recover the profits he would have made in fulfilling a contract depends solely upon the fault of the other party to it, and plaintiff's ability to show that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of.<sup>4</sup> It is not an insuperable objection to their recovery that they cannot be directly and absolutely proved. The general uncertainty attending human life and the special contingencies as to its duration on account of the physical condition of an individual whose rights are involved do not prevent the recovery of damages for causing his death or injuring his person. An agreement by one person to support another during life is an entire continuing contract upon the total breach of which the obligor is liable for full and final damages estimated to the

<sup>1</sup> *Laufer v. Boynton Furnace Co.*, 84 Hun, 311, 32 N. Y. Supp. 362.

<sup>2</sup> *Rule v. McGregor*, — Iowa, —, 90 N. W. Rep. 811; *Schrandt v. Young*, 89 N. W. Rep. 607 (Neb.).

<sup>3</sup> *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

<sup>4</sup> *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. Rep. 785; *Treat v. Hiles*,

81 Wis. 280, 50 N. W. Rep. 896; *American Contract Co. v. Bullen Bridge Co.*, 29 Ore. 549, 561, 46 Pac. Rep. 138, citing the text; *Rule v. McGregor*, — Iowa, —, 90 N. W. Rep. 811; *Schrandt v. Young*, 89 N. W. Rep. 607 (Neb.); *Farmers' Loan & Trust Co. v. Eaton*, 114 Fed. Rep. 14, 51 C. C. A. 640.

time the person who was to be supported would probably die.<sup>1</sup> It is the constant practice to so assess damages in actions to recover for personal injuries. In the nature of things where performance has been prevented the proof of profits cannot be direct and absolute. The injured party must, however, introduce evidence legally tending to establish damage and sufficient to warrant a jury in coming to the conclusion that the damages they find have been sustained; but no greater degree of certainty in this proof is required than of any other fact which is essential to be established in a civil action. If there is no more certain method of arriving at the amount the injured party is entitled to submit to the jury the particular facts which have transpired and to show the whole situation which is the foundation of the claim and expectation of profit, so far as any detail offered has a legal tendency to support such claim.<sup>2</sup> The law does not require that the party seeking

<sup>1</sup>Schell v. Plumb, 55 N. Y. 592; First Nat. Bank v. St. Cloud, 73 Minn. 219, 75 N. W. Rep. 1054; Ironton Land Co. v. Butchart, 73 Minn. 39, 75 N. W. Rep. 749; Morrison v. McAtee, 23 Ore. 530, 32 Pac. Rep. 400; Freeman v. Fogg, 82 Me. 408, 19 Atl. Rep. 907.

<sup>2</sup>Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 261; Newbrough v. Walker, 8 Gratt. 16, 56 Am. Dec. 127; Taylor Manuf. Co. v. Hatcher Manuf. Co., 39 Fed. Rep. 440, 446, 3 L. R. A. 587, quoting the text; Brewing Co. v. McCann, 118 Pa. 314, 12 Atl. Rep. 445; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. Rep. 291; Wakeman v. Wheeler & W. Manuf. Co., 101 N. Y. 205, 217, 54 Am. Rep. 676, 4 N. E. Rep. 264, quoting the text; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. Rep. 62; Lavens v. Lieb, 12 App. Div. 487, 42 N. Y. Supp. 901; Dickinson v. Hart, 142 N. Y. 183, 36 N. E. Rep. 801; United States Trust Co. v. O'Brien, 143 N. Y. 284, 38 N. E. Rep. 266; Skinner v. Shew, [1894] 2 Ch. 531.

The difficulty of fairly estimating the injury done an unknown author by the breach of a contract to pub-

lish his first book is not necessarily insuperable. Gale v. Leckie, 2 Stark. 107; Bean v. Carleton, 51 Hun, 318, 4 N. Y. Supp. 61. Compare Bean v. Carleton, 12 N. Y. Supp. 519. Nor the net proceeds which might have been derived from the sale of tickets to hear a noted lecturer. Savery v. Ingersoll, 46 Hun, 176. This is a very doubtful proposition in the absence of proof of an advance sale of tickets. See Bernstein v. Meech, 130 N. Y. 354, 29 N. E. Rep. 255, and § 60. Nor the damages resulting to a hotel from the violation of a contract to maintain a depot at a certain point. Houston, etc. R. v. Molloy, 64 Tex. 607. But it is otherwise with the breach of a contract to furnish a mule for the cultivation of land; in such case the damage resulting to crops is too uncertain. Harper v. Weeks, 89 Ala. 577, 8 So. Rep. 39; Luce v. Hoisington, 56 Vt. 436.

The damages following the breach of a contract to issue an annual railway pass during the life of a party are not too uncertain to be recovered. Curry v. Kansas, etc. R. Co., 58 Kan. 6, 48 Pac. Rep. 579.

to recover for gains prevented shall furnish *data* from which they can be mathematically computed. "When one breaks a contract which the other party has partly performed, and the violator then performs the work himself, from which he reaps the profits which the other party might have made, he cannot escape liability for damages if such other party can show the profits made while he was executing it, and the benefits received from its subsequent completion.<sup>1</sup>

<sup>1</sup>Hitchcock v. Supreme Tent Knights of Maccabees, 100 Mich. 40, 58 N. W. Rep. 640.

Where the plaintiff was permitted to sink but one of five wells which he had contracted to sink not less than two hundred feet in depth and five hundred feet if practicable and possible in the defendant's judgment, it was sufficient to show as a basis for damages what profit was made in sinking other wells in the vicinity of an average depth of four hundred feet. Sanford v. East Riverside Irrigation District, 101 Cal. 275, 35 Pac. Rep. 865.

If the trial does not occur until long after the cause of action arose and the contract contemplated a long period for its performance, the plaintiff may show the facts as they then exist. Shoemaker v. Acker, 116 Cal. 239, 48 Pac. Rep. 62. See § 107.

There are some cases in Michigan which are not in harmony with the principle stated in the text nor with the current of modern authority. In McKinnon v. McEwan, 48 Mich. 106, there was a breach of a contract to furnish boilers at the time agreed upon. The purchaser alleged that the boilers were to be used in his steam mill and salt block for running and operating the same; that they were the only boilers he would have to furnish steam; that the capacity of his salt block was two hundred barrels per day; that without the boilers he could not manufacture any salt,—all of which facts were known

to the vendor. The purchaser sought to recoup, as damages resulting from inability to prosecute his business, what he might have made from the use of the boilers. The court, by Marston, J., said: "In the present case the contract is silent as to the particular business which was to be carried on in the use of these boilers. That, it is said, was well known to both the contracting parties. But admitting all this, would not the profits to be made in the manufacture of salt be dependent upon many other things besides the performance of this contract—a necessary supply of fuel, which the defendant claims to have had, of brine, of machinery for pumping the same, of proper vats, of grainers, pipes and other things necessary to carry on successfully and profitably the manufacture of that commodity, the certainty or probability even, even if all these things did exist and were in proper order, of their remaining in like condition? But supposing the party had completed the boilers and had put them in place, but had failed to make all the necessary connections; no use could be made of the boilers in such a condition; would the damages be the same? In other words, 'where the chattel was itself only part of something else, which was rendered useless for want of it, should the profit of the entire chattel be recovered? If a vessel were delayed in port for want of a bowsprit, should a loss of freight, to the amount perhaps of

§ 64. **Same subject; Masterton v. Mayor.** In the leading [114] case in New York,<sup>1</sup> which has been extensively cited and approved, the plaintiffs agreed to furnish and deliver marble wrought in a particular manner, from a designated quarry, for

thousands of pounds, be obtained in damages?' Very many questions similar to this might be put, and if the rule contended for by plaintiff in error were to prevail, in many cases the breach of a very simple contract, or failure in some part, might bring ruin upon the parties failing, where no such loss was contemplated. The adoption of such a rule would be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly provide for such enlarged responsibility. Where the damages claimed, as in this case, largely exceed the contract price of the materials and labor to be furnished and performed by the party in default, we may well question the justice of such a conclusion in the absence of a clear showing that such a result was anticipated by the parties."

In *Allis v. McLean*, 48 Mich. 428, 12 N. W. Rep. 640 (cited approvingly in *Williams v. Island City Milling Co.*, 25 Ore. 573, 590, 37 Pac. Rep. 49), the vendor sold machinery for use in connection with a saw-mill. When the contract was made he was notified that one condition of the purchase was that the machinery was to be received on a day certain, and notice was given that for every day's delay the purchaser would be damaged \$150. Cooley, J., speaking for the court, said: "The profits of running a saw-mill are proverbially uncertain, indefinite and contingent.

They depend upon many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held, in cases like the present, that the party complaining of a breach of contract must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be. *Fleming v. Beck*, 48 Pa. 309; *Pittsburg Coal Co. v. Foster*, 59 id. 365; *Strawn v. Coggs*, 28 Ill. 457; *Frazer v. Smith*, 60 id. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159. But this case is thought to be different because here the fair rental value of the mill is proved, and it is said that this was certainly lost. But we do not know that that was the case. If the mill had been in condition to rent at that time, there may have been no customer for it on terms the owner would have consented to grant; and if customers were abundant and satisfactory, it cannot be assumed that the whole rental value

<sup>1</sup> *Masterton v. Mayor*, 7 Hill, 61. See *Jones v. Judd*, 4 N. Y. 411; *Danolds v. State*, 89 id. 36, 42 Am. Rep. 277; *Taft v. Tiede*, 55 Iowa, 370, 7 N.

W. Rep. 617; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. Rep. 255; *James H. Rice Co. v. Penn Plate Glass Co.*, 88 Ill. App. 407.

a public building. The quantity necessary to fill their contract was eighty-eight thousand eight hundred and nineteen feet, for which they were to be paid a specified price. They afterwards contracted with the proprietors of that quarry for the marble.

is lost when a mill stands idle. The wear and tear of machinery and buildings in use is something, and it is not improbable that the landlord would take this among other things into account in determining what should be the rent. But in this case it does not appear that rent was lost or could have been lost, for it is not shown that defendants desired to rent or would have consented to do so if a customer had offered." To the same effect are *Talcott v. Crippen*, 52 Mich. 633, 18 N. W. Rep. 392; *Petrie v. Lane*, 67 Mich. 454, 35 N. W. Rep. 70. *Talcott v. Crippen*, *supra*, is limited in *Leonard v. Beaudry*, 68 Mich. 318, 36 N. W. Rep. 88; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. Rep. 474; and *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. 976. See *First Nat. Bank v. Thurman*, 69 Iowa, 693, 25 N. W. Rep. 909. *Allis v. McLean*, *supra*, is approved in *Moulthrop v. Hyett*, 105 Ala. 493, 17 So. Rep. 32, and followed in *John Hutchinson Manuf. Co. v. Pinch*, 91 Mich. 156, 51 N. W. Rep. 930. The latter modifies *Allis v. McLean* as to the recovery of rental value.

It is conceded by the writer of the opinion in *McKinnon v. McEwan*, *supra*, that profits which would arise as the direct result of work done at the contract price may be recovered, and that they may be recovered in cases of torts. Both these propositions are established in Michigan. *Burrell v. New York, etc. Salt Co.*, 14 Mich. 39; *Allison v. Chandler*, 11 id. 558; *Mueller v. Bethesda Spring Co.*, 88 Mich. 390, 50 N. W. Rep. 319; *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. Rep. 609. It is also admitted that there is another

class of cases, within which the case before the court came, where the authorities differ as to the right of the injured party to recover such profits as were claimed. The inference from these statements is that the court did not intend to hold that profits are never recoverable. This is made more clear by the observations of Cooley, J., in *Allis v. McLean*, *supra*. But it is not clear from both cases that their result is not to establish the rule that profits are not recoverable for the breach of a contract, unless it is so stipulated therein or the article which is the subject of the contract is one which "at all times finds a ready sale at a current market price," or unless contracts are dependent one upon another, in which case, if the second contract is broken, "the loss of definite and fixed profits under the other is a necessary and immediate consequence." *Allis v. McLean*, *supra*. See *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. Rep. 25.

In *McKinnon v. McEwan*, *Mars-ton, J.*, said that in *Hadley v. Baxendale* "the court held the loss of profits while the mill was kept idle could not be recovered, because it did not appear the carrier knew that the want of the shaft was the only thing which was keeping the mill idle. The court also intimated that a different rule might have prevailed had the facts been fully known to the carrier. Of course, no such question was before the court in that case, and intimations given upon facts that may perhaps appear in some future case are not usually relied upon." The opinion lays stress on the fact that the contract was

When the plaintiffs had delivered fourteen thousand seven hundred and seventy-nine feet and had on hand at the quarry three thousand three hundred and eight feet ready for delivery, the defendants suspended the performance of the contract without any fault of the plaintiffs. They sought to recover the profits of the contract and also the damages to which they were subjected for the consequent violation of

silent as to the business to be carried on with the boilers which were to be furnished, and the knowledge of the parties was not regarded as material. It is conceded by Cooley, J., in *Allis v. McLean*, that the machinery was purchased with a view to the profits which its use was expected to produce, and that "the contract" to furnish it "would not be entered into if the profits were not expected and counted upon." It necessarily results, according to the general rule established by the authorities, that where the vendor has knowledge of the use to which the article he sells is to be put, though the written contract is silent, that he contemplates the injury which the vendee will sustain from his failure to comply with his agreement. The test which Judge Marston lays down that "the profits to be recovered must not be conjectural or speculative in their nature or dependent upon the chances of business or other contingencies, and must have reference to the nature of the contract and breach complained of," is as to the second alternative too latitudinarian, and, strictly applied, is not consistent with the recovery of profits in any case. Profits are the result of business; the desire for them is the cause of business. It is true that profits will not be recoverable as a measure nor as an element of damages if they are purely conjectural, nor if they are speculative in the sense of depending on contingencies which are possible and not probable. The

chances of business include many things, both sufficiently certain as a basis for the administration of justice and too uncertain therefor. The authorities cited in the discussion devoted to this subject, and especially the more recent ones, are opposed to the view taken by the Michigan court in both the cases considered. The uncertainty connected with the profits claimed was magnified. Damages resulting from the discontinuance or interruption of an established business are proved with sufficient certainty by showing what the profits of the business have been. See *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. Rep. 609. Of course, if there has been a change in the conditions it is taken into account. Cases in which damages are allowed for the breach of partnership agreements are an example. There are three recent and well considered cases in Wisconsin which are in harmony with the writer's view of the law, and which are not materially different in their facts from the Michigan cases considered. *Jones v. Foster*, 67 Wis. 296, 30 N. W. Rep. 697; *Cameron v. White*, 74 Wis. 425, 43 N. W. Rep. 155, 5 L. R. A. 493; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. Rep. 896.

The profits lost to a mill owner because of the non-delivery of logs as contracted for, to be manufactured into lumber at a fixed price, are not too speculative. *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. Rep. 976.

their subcontract for the marble at the quarry. Nelson, C. J., said: "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature and too dependent upon the fluctuation of the markets and chances of business to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered it has no legal or necessary connection with the stipulations between the parties and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach.<sup>1</sup> So, a good bargain made by a vendor, in anticipation of the price of the article sold; or an advantageous contract of resale made by a vendee confiding in the vendor's promise to deliver the article, are considerations excluded as too remote and contingent to affect the question of damages. . . . When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into account in ascertaining the true measure of damages they usually have reference to de- [115] pendent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may, and doubtless often does, exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect

<sup>1</sup>Shoemaker v. Acker, 116 Cal. 239, 245, 48 Pac. Rep. 62. See § 47.

to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs are embarrassed than if it had been made with one in prosperous or affluent circumstances.<sup>1</sup> But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.<sup>2</sup> The parties may have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment, going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard." Applying these principles to the case the learned judge said: "The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject-matter of the contract had been bricks, rough stones or other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only [116] the mode of ascertaining the actual value, or rather the cost to the party producing it. Where the article has no market value an investigation into the constituent elements of the cost to the party who has to furnish it become necessary, and that, compared with the contract price, will afford the meas-

<sup>1</sup> Dom., B. 3, tit. 5, § 2, art. 4.

<sup>2</sup> Shoemaker v. Acker, *supra*, quoting the text; Goldhammer v. Dyer, 7 Colo. App. 29, 42 Pac. Rep. 177; Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 622, 44 Pac. Rep. 621, 54 Am. St. 598; Hirschhorn v. Bradley, — Iowa, —, 90 N. W. Rep. 592;

Treat v. Hiles, 81 Wis. 280, 50 N. W. Rep. 896; Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. Rep. 876; Farmers' Loan & Trust Co. v. Eaton, 114 Fed. Rep. 14, 51 C. C. A. 640; Owensboro-Harrison Telephone Co. v. Wisdom, 23 Ky. L. Rep. 97, 62 S. W. Rep. 529.



ure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract at the place of delivery. . . . It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years — of which about one year and a half only had expired at the time of the suspension — the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain *data* upon which to make the estimate. If it were necessary to make the estimate upon any such basis the argument would be decisive of the present claim. But in my judgment no such necessity exists. When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance. . . . It will be seen that we have laid altogether out of view the subcontract . . . and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, [117] these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. . . . And yet, the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one shows the injustice of restricting the damages in cases like the pres-

ent to compensation for the work actually done, and the item of the materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in default. If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount it be made upon a substantial basis, and not left to rest upon loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectured account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlay in labor and capital."

§ 65. **Violation of contract to lease.** The plaintiff agreed with the defendant to take a lease of premises belonging to the latter for the purpose, as he knew, of carrying on a trade which plaintiff was about to commence. The defendant wilfully refused to carry out his agreement, and plaintiff was unable for fifteen weeks to commence business. Specific performance of the agreement was decreed and damages were awarded for loss of profit.<sup>1</sup> The damages resulting from the

<sup>1</sup>Jaques v. Millar, 6 Ch. Div. 153. 36 Ark. 518; Beidler v. Fish, 14 Ill. Alexander v. Bishop, 59 Iowa, 572, 13 App. 623, are not in accord with the N. W. Rep. 714; Brockway v. Thomas, English case.

failure to perform a contract to rent premises is the difference between what they were worth and the rent agreed upon.<sup>1</sup> Where the lease of a farm which was to be worked on shares for several years stipulated that if the owner exercised his reserved right to sell the farm during the term he should pay any damages which the lessee sustained by giving up possession, the latter's rights are the same as they would have been if the sale had been made wrongfully; he was entitled to recover the value of his contract — what the privilege of occupying and working the farm was worth, subject to the terms of the contract and under all the contingencies liable to affect the result.<sup>2</sup> But time spent by the person who was to be the lessee in securing other premises is not an element of the damages.<sup>3</sup> If the lessee of business premises is evicted and his business broken up he may recover the prospective profits thereof for the remainder of the term.<sup>4</sup> If the lessor of business property fails to keep it in repair as he agreed to do the lessee may recoup for the loss of custom and the profits he might have made but for the breach; and it will be enough for him to show facts which enable the jury to approximate his losses.<sup>5</sup> A lessee who violates covenants in the lease as to posting a notice "to let" and allowing the premises to be shown will be liable for the loss of rent resulting.<sup>6</sup>

**§ 66. Profits of labor.** Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at the contract price, and is prevented from earning this profit by the wrongful act of another party, its loss is a direct and natural result which the law will presume to follow the breach of the contract; and he is en- [118]

<sup>1</sup> *Eastman v. Mayor*, 152 N. Y. 468, 46 N. E. Rep. 461.

<sup>2</sup> *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8; *Taylor v. Bradley*, 39 N. Y. 129; *Shoemaker v. Crawford*, 82 Mo. App. 487; *Cilley v. Hawkins*, 48 Ill. 308; *North Chicago Street R. Co. v. Le Grand Co.*, 95 Ill. App. 435.

<sup>3</sup> *Schultz v. Brenner*, 24 N. Y. Misc. 522, 53 N. Y. Supp. 972.

<sup>4</sup> *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. Rep. 1059; *Farmers' Loan &*

*Trust Co. v. Eaton*, 114 Fed. Rep. 14, 51 C. C. A. 640, applying the rule to the termination of the lease of a railroad executed by a receiver; *Owensboro-Harrison Telephone Co. v. Wisdom*, 23 Ky. L. Rep. 97, 62 S. W. Rep. 529 (violation of lease for use of telephone).

<sup>5</sup> *Stewart v. Lanier House Co.*, 75 Ga. 582.

<sup>6</sup> *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. Rep. 266. See ch. 20.

titled to recover it without special allegations in his declaration. The amount of damage may be established by showing how much less than the contract price it will cost to do the work or perform the contract.<sup>1</sup> Actual damages clearly include the direct and actual loss which a plaintiff sustains *propter rem ipsam non habitam*. And in case of such contracts the loss of profits, among other things, is the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise. Where profits are advisedly spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or state of the market is referred to, and not the difference between an agreed price of something contracted for and its ascertainable value or cost.<sup>2</sup>

**§ 67. Profits from commercial ventures.** The success of business ventures is not antecedently certain in an absolute sense; they are generally undertaken in reliance upon probabilities

<sup>1</sup> Leonard v. Beaudry, 68 Mich. 310, 13 Am. St. 344, 36 N. W. Rep. 88; Mississippi & Rum River Boom Co. v. Prince, 34 Mich. 71, 24 N. W. Rep. 344; Oldham v. Kerchner, 79 N. C. 106; Jolly v. Single, 16 Wis. 280; Kinney v. Crocker, 18 id. 74; Hinckley v. Beckwith, 13 Wis. 31; McAndrews v. Tippet, 39 N. J. L. 105; United States v. Speed, 8 Wall. 77; Doolittle v. McCullough, 12 Ohio St. 360; Middekauff v. Smith, 1 Md. 343; Clark v. Mayor, 4 N. Y. 338, 53 Am. Dec. 379; Cook v. Commissioners of Hamilton, 6 McLean, 612; Frye v. Maine, etc. R. Co., 67 Me. 414; Lentz v. Choteau, 42 Pa. 435; James v. Adams, 8 W. Va. 568; Cramer v. Metz, 57 N. Y. 659; Devlin v. Mayor, 63 N. Y. 8; Hoy v. Gronoble, 34 Pa. 9, 75 Am. Dec. 628; Thompson v. Jackson, 14 B. Mon. 114; Fox v. Harding, 7 Cush. 516; Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403; Elizabethtown, etc. R. Co. v. Pottinger,

10 Bush, 185; Wallace v. Tumlin, 42 Ga. 462; United States v. Smith, 94 U. S. 214; Somers v. Wright, 115 Mass. 292; Richmond v. D. & S. C. R. Co., 40 Iowa, 264; Fail v. McRee, 36 Ala. 61; Goldman v. Wolff, 6 Mo. App. 490; Dennis v. Maxfield, 10 Allen, 138; Skagit R. & L. Co. v. Cole, 2 Wash. 57, 25 Pac. Rep. 1077; Fell v. Newberry, 106 Mich. 542, 64 N. W. Rep. 474; O'Connor v. Smith, 84 Tex. 232, 19 S. W. Rep. 168; Barret v. Grand Rapids Veneer Works, 110 Mich. 6, 67 N. W. Rep. 976; Ramsey v. Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. Rep. 391; Equitable Mortgage Co. v. Weddington, 2 Tex. Civ. App. 373, 21 S. W. Rep. 576. See ch. 15.

<sup>2</sup> Philadelphia, etc. R. Co. v. Howard, 13 How. 344; O'Connor v. Smith, 84 Tex. 232, 19 S. W. Rep. 168; Hirschhorn v. Bradley, — Iowa, —, 90 N. W. Rep. 592.

based upon the law of demand and supply. Though speculative in their inception, by anticipating future values, they are generally retrospectively examined when they become subjects of judicial investigation, and then such values are capable of proof. If the business, the profits from which are in question, is a trading business they must depend on a succession of purchases of stock of some sort for sale, or the employment of labor or material to be purchased for its production, and a succession of sales to prospective customers. Where the [119] injury complained of is an interruption or prevention of such a business, or causes a diminution of it, it is scarcely possible to establish damages to a very high degree of certainty.<sup>1</sup> In many cases the best conclusion will be merely a probable one. The rule of law is the same in all cases that the damages be proved with certainty; but a greater degree of certainty being attainable in some cases than is possible when the result sought depends on the chances of future bargains, the law will not permit the proof which is certain to be neglected, and resort be made to that which is less satisfactory; though the latter, in other cases, is the best the nature of the case admits of, and must be received as the only guide to the proper amount of compensation, and is then available.<sup>2</sup> The damages resulting from the breach of an agreement to furnish the plaintiff facilities for carrying on his business in a store during a fixed term were sufficiently shown by proof of the gross receipts made

<sup>1</sup> See *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 622, 44 Pac. Rep. 621, 54 Am. St. 598.

<sup>2</sup> *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. Rep. 191; *Alexander v. Breeden*, 14 B. Mon. 154; *Houston, etc. R. Co. v. Hill*, 70 Tex. 51, 7 S. W. Rep. 659; *Same v. Molloy*, 64 Tex. 607; *Kelly v. Miles*, 58 N. Y. Super. Ct. 495, 12 N. Y. Supp. 915; *Oliver v. Perkins*, 52 N. W. Rep. 609, 92 Mich. 304; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. Rep. 896; *World's Columbian Exposition Co. v. Pasteur-Chamberland Filter Co.*, 82 Ill. App. 94; *Fraser v. Echo Mining & Smelting Co.*, 9 Tex. Civ. App. 210, 28 S. W. Rep. 714;

*Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309, 53 N. W. Rep. 501.

In an action to recover for misrepresentations concerning his business the plaintiff alleged injury to his credit, whereby he was unable to obtain goods to sell, and that he therefore lost profits. The damage claimed under the latter head was too remote. *Bradstreet Co. v. Oswald*, 96 Ga. 396, 23 S. E. Rep. 423.

One cannot recover the loss of the prospective profits of a business which is illegal, and which he discontinued because of threats. *Prude v. Sebastian*, 107 La. 64, 31 So. Rep. 764.

during the two years business was done there, the net profits, the income obtained elsewhere during the succeeding year, and what plaintiff was able to earn after his business in the store was broken up.<sup>1</sup>

§ 68. **Profits on dissolution of partnership.** One partner may maintain an action at law against another for a breach of the copartnership articles in dissolving before the time limited therefor, and may do so before the expiration of the period for which the partnership was to continue. The damages are the profits which would have accrued to the plaintiff from the continuation of the partnership business, and which are lost by its unauthorized dissolution.<sup>2</sup> The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss thereof. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period.<sup>3</sup> It is safe to say that such profits cannot be proved except to a reasonable probability. The profits immediately before the dissolution may be shown as a competent fact for the considera-

<sup>1</sup> Dickinson v. Hart, 142 N. Y. 183, 36 N. E. Rep. 801.

<sup>2</sup> Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Treat v. Hiles, 81 Wis. 280, 50 N. W. Rep. 896.

<sup>3</sup> Bagley v. Smith, *supra*; McNeill v. Reid, 9 Bing. 68; Gale v. Leckie, 2 Stark. 107; Mitchell v. Read, 84 N. Y. 556; Burekhardt v. Burekhardt, 42 Ohio St. 474, 498, 58 Am. Rep. 842, citing the text and applying the principle to the breach of a contract for the sale of the good-will of a business.

In Reiter v. Morton, 96 Pa. 229, 242, the measure of damages for the wrongful dissolution of a manufacturing partnership was held to be the actual money value of the plaintiff's interest in the firm at the time of the breach. "What would the interest sell for to a person willing to buy

and having the means to buy? As illustrating this question the actual state and condition of the property, business and assets of the firm at the time, together with proof of actual results accomplished, whether of profit or loss or both, in the past, would be competent evidence. Beyond this, at least so far as conjectural profits in the future are concerned, it would not be safe to go."

Where one partner rendered services and the other furnished the capital, there being no time fixed for the duration of the partnership, the damages recoverable by the former for its wrongful dissolution were the value of his services, skill, etc., in conducting the partnership business, and not his share of profits for any specific time. Ball v. Britton, 58 Tex. 57.

tion of the jury. In *Bagley v. Smith*<sup>1</sup> Judge Johnson said: "It seems to me quite obvious that outside of a court of [120] justice no man would undertake to form an opinion as to prospective profits of a business without in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of the tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstances connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary." In a subsequent case, where the business in the past had been a losing one, it was held error to charge, as the plaintiff requested, that the jury were not confined in estimating damages to the rate of profits at the time of dissolution, but might consider and give damages for profits that would probably have been made by the higher prices; and might consider the present and probable future rate during the balance of the partnership, though the court added: "It requires some care. You are not to guess about this matter. If you can rationally see through this that the profits would have been greater in the future, and are greater at the present time than at the time of the dissolution, and you believe that the present increased profits, if such there would be, are likely to continue and increase, and you can satisfy yourselves of this in your own mind, then you have the right to look through the remainder of the time of the partnership, making a very careful estimate in regard to what the profits might probably be." The supreme court regarded the instruction to give damages for profits that would *probably* have been made by the *higher prices*, and authorizing the jury to consider

<sup>1</sup> 10 N. Y. 489, 61 Am. Dec. 756.

the present and probable future rate, as going beyond any previous case in favor of speculative and contingent profits; the former case was referred to as adhering to the rule of certainty. The court say, also, "The case at bar differs from that case, [121] and the cases cited therein, inasmuch as in those cases where the court was submitting the question of damages to the jury they were no longer prospective; but at the time of the trial in those cases respectively, the time had expired up to which the profits in question were to be estimated. In such cases all the *data* for ascertaining what profits might have been obtained from the business could be furnished by witnesses and there was no need of resorting to conjecture."<sup>1</sup> This case insists on a more rigid rule than the former one. It was, however, a case in which there was very little *data* for finding even a probable profit.<sup>2</sup> If one partner fails to pay in a portion of his share of the capital and the copartner continues in the firm until it is dissolved by mutual consent, there cannot be a recovery of profits which might have been made if such share had been fully paid; the payment of interest will adjust the parties' rights.<sup>3</sup> Where a copartner to whom a premium has been paid wrongfully brings an action to dissolve the partnership the premium may be apportioned and an equitable part of it be adjudged in such action to be returned.<sup>4</sup>

§ 69. **Commercial agencies.** The contracts between commercial agents and their principals embody as many elements of uncertainty as are usually found in combination; among others (at least where the compensation is based upon commissions) the state of trade, quality and price of the goods offered, the skill, energy and industry with which the business is prosecuted, the credit of the parties to whom the sales are made, and the acceptance of the agent's orders by his principal, are all considerations which tend to make the damages

<sup>1</sup> Van Ness v. Fisher, 5 Lans. 236.

<sup>2</sup> See Dobbins v. Duquid, 66 Ill. 464; Park v. C. & S. W. R. Co., 43 Iowa, 636; Smith v. Wunderlich, 70 Ill. 426; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Shafer v. Wilson, 44 Md. 268; Lacour v. Mayor, 3 Duer, 406; St. John v. Mayor, 13 How. Pr. 527; Richmond v. Dubuque, etc. R. Co., 33

Iowa, 423; Satchwell v. Williams, 40 Conn. 371; Schile v. Brokhahus, 80 N. Y. 614; Treat v. Hiles, 81 Wis. 280, 50 N. W. Rep. 896.

<sup>3</sup> Delp v. Edlis, 190 Pa. 25, 42 Atl. Rep. 462.

<sup>4</sup> Corcoran v. Sumption, 79 Minn. 108, 81 N. W. Rep. 761.



sustained by an agent by reason of the wrongful revocation of his agency so uncertain as to be difficult, if not impossible, of ascertainment.<sup>1</sup> Past sales do not afford a safe basis for estimating future profits because the conditions may not remain as they were,<sup>2</sup> and also because the time and service of the salesman, which have been given to the making of them, will be his, on the termination of the employment, to use otherwise.<sup>3</sup> The damages in cases of this class are not speculative or remote, and the difficulty in ascertaining them does not deter courts from awarding such compensation for their breach as the evidence shows with reasonable certainty the wronged party is entitled to. It would be a reproach to the law if he could not recover all the damages sustained.<sup>4</sup> Where an agent selling on commission was discharged three months before the expiration of his contract the court said it could see no great difficulty in proving facts that would enable a jury to determine approximately the amount of goods the plaintiff would have sold during that time. He had been a traveling salesman for the defendant during the two preceding years, and his sales during the corresponding months of those years could have been shown, as might the state of the markets, the number of his regular customers, etc.<sup>5</sup> If the agent, at the time of the revocation of his authority, had agreements for sales which he could have consummated but for the wrongful act of his principal he is entitled to his commissions on them, if it is clear that they would have been made. Mere expectations, doubtful offers or other vague or indefinite assurances of intention to purchase are speculative.<sup>6</sup> The loss of employment is an element of damage, but no standard can be fixed for ascertaining the extent of it.<sup>7</sup> If the principal

<sup>1</sup> *Union Refining Co. v. Barton*, 77 Ala. 148; *Brigham v. Carlisle*, 78 id. 243, 56 Am. Rep. 28; *Stern v. Rosenheim*, 67 Md. 503, 10 Atl. Rep. 231, 307. See *Noble v. Hand*, 163 Mass. 289, 39 N. E. Rep. 1020.

<sup>2</sup> *Id.*; *Washburn v. Hubbard*, 6 Lans. 11; *Hair v. Barnes*, 26 Ill. App. 580.

<sup>3</sup> *Ray v. Lewis*, 67 Minn. 365, 69 N. W. Rep. 1100.

<sup>4</sup> *Baldwin v. Marqueze*, 91 Ga. 404, 18 S. E. Rep. 309.

<sup>5</sup> *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. Rep. 125.

<sup>6</sup> See *Dowagiac Manuf. Co. v. Corbit*, 127 Mich. 473, 86 N. W. Rep. 954, 87 id. 886.

<sup>7</sup> *Beck v. West*, 87 Ala. 213, 6 So. Rep. 70.

has accepted orders from his agent and refused to fill them the commission thereon may be recovered;<sup>1</sup> but not damages which resulted to the business of the agent otherwise.<sup>2</sup> A more liberal rule has been held in a case which has been often cited.<sup>3</sup> The contract sued upon provided that if the plaintiff should sell fifty of defendant's machines to one firm in Mexico for every such sale he should have the exclusive agency of the machines in that locality, they to be furnished by the defendant at the lowest price, and the plaintiff to receive a commission. Two such sales were made, the order for one of which was filled; the other order was not filled; the contract was repudiated. Agencies were established by the plaintiff at the places where these sales were made. The court observed that these agencies were to be exclusive, and to have some permanency. They were valuable to the plaintiff, and though there was difficulty in ascertaining the damages he sustained, it was not greater than existed in other cases where profits had been recovered. There were some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice; such as the fact that sales had been made before the breach and afterwards; the qualifications of the agent and those who operated under him to make sales; the facilities for carrying on business, and like facts would have warranted a verdict which would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will allow.<sup>4</sup> In another case

<sup>1</sup> Taylor Manuf. Co. v. Hatcher Manuf. Co., 39 Fed. Rep. 440, 3 L. R. A. 587.

<sup>2</sup> Id.

<sup>3</sup> Wakeman v. Wheeler & W. Manuf. Co., 101 N. Y. 205, 54 Am. Rep. 671, 4 N. E. Rep. 264; Bannatyne v. Florence Milling & Mining Co., 77 Hun, 289, 28 N. Y. Supp. 334, applying the rule in the Wakeman case, *supra*; Crittenden v. Johnston, 7 App. Div. 258, 40 N. Y. Supp. 87; More v. Knox, 52 App. Div. 145, 64 N. Y. Supp. 1101; Wells v. National L. Ass'n, 39 C. C. A.

476, 95 Fed. Rep. 222, 53 L. R. A. 33, approving the Wakeman case, *supra*; Hitchcock v. Supreme Tent Knights of Maccabees, 100 Mich. 40, 58 N. W. Rep. 640, 43 Am. St. 423; Hirschhorn v. Bradley, — Iowa, — 90 N. W. Rep. 592. See Meylert v. Gas Consumers' Benefit Co., 26 Abb. N. C. 262, 14 N. Y. Supp. 148; § 62, and Mechanics' & Traders' Ins. Co. v. McLain, 48 La. Ann. 109, 20 So. Rep. 278.

<sup>4</sup> In Howe Machine Co. v. Bryson, 44 Iowa, 159, 24 Am. Rep. 735, a majority of the court held that an agent could not recover as damages

there was an unauthorized revocation of the sole agency for the sale of an article. The agent's recovery was measured by the profits he might have realized if there had been no breach of the principal's contract. In order to determine what they would have been, proof of the actual sales of the article made by the agent's successor during the term the former was entitled to the agency was admissible.<sup>1</sup> On the revocation of the sole agency for the sale of an article in prescribed territory evidence of the sales made by the agent after the breach and up to the time of the trial is competent to establish his claim for the loss of profits.<sup>2</sup>

The breach of a contract giving the plaintiff a general agency for a term of years, within a specified territory, of a life insurance company, he to have sole charge of such territory, establish sub-agencies and receive as compensation commissions on the first and subsequent premiums paid, gives a cause of action for loss of commissions on premiums to become due afterward. It was said: "It is evident that all the schemes of insurance referred to in the contract to be offered to the public contemplated the keeping of the policies alive by payments made from time to time subsequent to the first year's premium. Between the parties to the contract, the presumption is that the policies would be kept alive, and these subsequent payments — renewal premiums as they are called — would be received by the defendant company. The conduct of that company in breaking the contract entitles the plaintiff to this presumption and puts upon the defendant the burden

for the breach of a contract to furnish him machines to sell on commission the profits which might have been realized if the contract had been performed. The New York court in the case considered in the text concurs with the two Iowa judges who dissented. It is said in *Hirschhorn v. Bradley, supra*: If the question considered in *Machine Co. v. Bryson, supra*, were now before us for the first time, we might, in view of the later authorities, incline to the view expressed in the dissenting opinion. As supporting that

view, see *Wells v. National L. Ass'n*, 39 C. C. A. 476, 95 Fed. Rep. 222, 53 L. R. A. 33.

<sup>1</sup> *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N. W. Rep. 319, approved in *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. Rep. 125; *Hirschhorn v. Bradley*, — Iowa, —, 90 N. W. Rep. 592. *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. Rep. 785, is in harmony with the cases sustaining the right to recover profits.

<sup>2</sup> *Hirschhorn v. Bradley, supra*.

of showing the contrary, if it exists, and the extent to which it does exist. So all uncertainty is eliminated from this branch of the plaintiff's claim for loss of profits. As to the other branch, assuming, as we must for the present do, that the defendant breached the contract as alleged in the petition, entered the territory allotted to the plaintiff, and has through other agents and agencies, since the date of the breach, written a large amount of other insurance, such as the contract between the parties contemplated would be obtained by and through the action of the plaintiff and his sub-agents, the amount of such insurance so taken and carried by the defendant up to the time of the trial may be exactly shown by the testimony of the managing agents of the defendant, or by its books, or by both. . . . There can be, therefore, no substantial difficulty in arriving at this amount, at least with substantial accuracy. . . . Whether he could, and with reasonable probability would, have done all or a definite portion of this work, had the defendant not breached the contract, is a proper subject for the finding of a jury on the proof that may be offered as to the means which the plaintiff had organized and was using for the efficient prosecution of this work, compared with the means and effort which the defendant has used in its accomplishment of the work so done by it in the territory allotted to the plaintiff. He is not necessarily or even probably entitled to receive the full specified rate of percent. on the first year's and subsequent premiums paid and to be paid on policies so issued by defendant through its other agents and agencies, for some deduction must necessarily be made on account of the fact that he could incur no current expenses, nor render any personal services in the procurement of this insurance thus obtained by the defendant through its other agents and agencies. The condition of the business "in the territory assigned to the plaintiff "at the time of the breach; the means that had been used and were being used by the plaintiff to work the territory allotted to him; the machinery which he had organized for the purpose of that work; the reasonable cost of its continued operation; the extent of the territory allotted to him; the number of persons therein who were fit subjects for such insurance as the defendant proposed to write; the reasonable relative proportion of cost for the-

first year of organizing the business and putting it in operation to the cost of continuing its conduct during the subsequent years; the machinery actually used by the defendant after it entered the territory allotted to the plaintiff, and its success, through the use of this machinery, and the agencies it established, in obtaining applicants for insurance and holders for its policies, should all be given to the jury."<sup>1</sup> A manufacturer of a particular style of hats who gives a local dealer the exclusive agency for their sale cannot, upon withdrawing the agency, refuse to fill orders sent by the agent and accepted prior to the termination of the agency; and where such agency is transferred to another dealer in the same city, so that it was impossible for the deposed agent to buy the hats at wholesale, he may prove the retail price charged by the new agent as tending to show the market value of the hats called for by such orders, and as establishing the measure of recovery for the profits lost. The plaintiff's right to such profits was not affected because he sold other hats as valuable as those made by the defendant, nor though he sold as many of such as he would formerly have sold of those furnished by the defendant.<sup>2</sup> In ascertaining the value of such an agency no account is to be taken of the stock in the hands of the agent which he has paid for, the principal not having bound himself to take it from the agent.<sup>3</sup>

**§ 70. Tortious interference with business.** In actions for torts injurious to business the extent of the loss is provable by the same testimony as in actions to recover for the loss of profits caused by the breach of contracts, and recovery may be had for

<sup>1</sup> *Wells v. National L. Ass'n*, 39 C. C. A. 476, 489, 99 Fed. Rep. 222, 53 L. R. A. 33; *Hitchcock v. Supreme Tent Knights of Maccabees*, 100 Mich. 40, 58 N. W. Rep. 640, 43 Am. St. 423. See *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Pellett v. Manufacturers' & Merchants' Ins. Co.*, 43 C. C. A. 669, 104 Fed. Rep. 502.

<sup>2</sup> *More v. Knox*, 52 App. Div. 145, 64 N. Y. Supp. 1101.

Where a person has the exclusive right to buy from another and resell

the goods so bought within a certain territory, in which the vendor has a monopoly, and he, violating his contract, sells goods to other persons within such territory, he is liable to the first person for the profits he may show, with reasonable certainty, would have been his if there had not been a breach of the contract. *Russell v. Horn, etc. Manuf. Co.*, 41 Neb. 567, 59 N. W. Rep. 901.

<sup>3</sup> *Vosburg v. Mallory*, 70 App. Div. 247, 75 N. Y. Supp. 480.

such as is proved with reasonable certainty; it is enough to show what the profits would probably have been.<sup>1</sup> Certainty is very desirable in estimating damages in all cases; and where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured, it should be applied to actions of tort as well as to those upon contract. The law, however, does not require impossibilities; and cannot, therefore, demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of.<sup>2</sup> But it is otherwise where the business is subject to the contingencies of weather, breakages, delays, etc.<sup>3</sup> There is no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of a cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when from the nature of the case the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, no

<sup>1</sup> *Allison v. Chandler*, 11 Mich. 542; 661, 26 N. W. Rep. 524; *Schrivver v. Denny v. Bisa*, 6 La. Ann. 365; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Schile v. Brokbahus*, 80 N. Y. 614; *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. Rep. 609; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. Rep. 345; *White v. Moseley*, 8 Pick. 356; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. Rep. 113; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686; *National Fibre Board Co. v. Lewiston & A. Electric Light Co.*, 95 Me. 318, 49 Atl. Rep. 1095; *Paul E. Wolff Shirt Co. v. Frankenthal*, 70 S. W. Rep. 378, — Mo. App. —; *Pacific Steam Whaling Co. v. Alaska Packers' Ass'n*, — Cal. —, 72 Pac. Rep. 161.

<sup>2</sup> *Willis v. Perry*, 92 Iowa, 297, 306, 60 N. W. Rep. 727, 26 L. R. A. 124; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St.

<sup>3</sup> *Cushing v. Seymour*, 30 Minn. 301,

objection is perceived to placing before the jury all the facts and circumstances of the case having any tendency to [122] show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances may require, and as may tend to prevent the allowance of such damages as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.<sup>1</sup> If the business interfered with was conducted

15 N. W. Rep. 209. In this case plaintiff had entered into contracts for threshing grain before the conversion of the machine which he was to use in executing them.

In *Jones v. Call*, 96 N. C. 337, 60 Am. Rep. 416, 2 S. E. Rep. 647, a manufacturer of machines, unlawfully prevented from carrying on his business, recovered damages to the extent that the machines then contracted for would have yielded him a profit. The estimated profits beyond that point were considered too speculative and remote. See *Clements v. State*, 77 N. C. 142, doubted in the preceding case.

<sup>1</sup> *Allison v. Chandler*, *supra*. In this case Christiancy, J., said: "Since, from the nature of the case (one of injury to business), the damages cannot be estimated with certainty, and there is risk of giving by one course of trial less, and by the other more, than a fair compensation—to say nothing of justice—does not sound policy require that the risk should be thrown upon the wrong-doer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the re-

covery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule." *Gilbert v. Kennedy*, 22 Mich. 129. See *Jenkins v. Pennsylvania R. Co.*, 67 N. J. L. 331, 51 Atl. Rep. 704; *Cosgriff v. Miller*, — Wyo. —, 68 Pac. Rep. 206, 215.

In *Holden v. Lake Co.*, 53 N. H. 552, the action was case for so interfering with the natural flow of the river, on which the plaintiffs had a mill for the manufacture of woolen goods, as to diminish its production. Upon the question of damages one of the plaintiffs was permitted to state that the cost of the raw material manufactured at their mill in producing a yard of cloth was about one-half the value of a yard of cloth when finished. There was no evidence as to the cost of manufacturing a yard of cloth, nor the number of yards manufactured, either monthly or otherwise, but only the aggregate amount of business in dollars annually; and the falling off in the aggregate business during the dry months of summer, when the plaintiffs claim they were injured, as compared with the average of the other months of the year. The court say: "It is difficult to see what other rule could have been applied to show what the effect of the alteration

under a license granted by public officers and the issue of a new license depends upon their discretion, profits which might have been realized for a time beyond the existence of the license in

was, than by showing the facts before and after the change, and how the change affected the stream and the plaintiffs' rights. . . . The cost of the cloth would be made up of the cost of raw materials and of the labor expended in the manufacture. The profits, if anything, would be ascertained by deducting from the market value, first, the cost of material, and then the expense of manufacture. But it seems that the expense was not ascertained in that way, nor the profits. When the mill-owner keeps his whole force through the year on full pay, then the amount he manufactures less than the full amount for the year would be so much dead loss, without regard to the profits on a single yard; and the value of the work lost by lack of water would be found by deducting the cost of raw material from the value of the cloth that would have been made with a full supply of water."

In *Richmond v. Dubuque, etc. R. Co.*, 33 Iowa, 422, the railroad company and an elevator company at Dubuque entered into an agreement containing these stipulations: that the latter would erect a building suitable "for receiving, storing, delivering and handling all grain that shall be received by the cars of said railroad company not otherwise consigned." In a supplement to this contract it was further provided that the elevator company "should receive and discharge for the said railroad company all through grain at one cent a bushel," etc., and that the elevator should have the handling of all through grain at that price per bushel. It was also provided that in case the grain was held in store for the railroad company more

than ten days, then the elevator company should have a certain per cent. per bushel. The contract, by its terms, extended for a period of fifteen years, and at the option of the railroad company it was to be extended fifteen years more, but no times of payment were provided for therein. In an action against the railroad company for refusing to give the elevator company the handling of grain according to the contract, the court held that in the estimate of damages the plaintiffs were entitled to recover not only loss of profits which would have resulted to them had the "through grain" been delivered as per contract, but also the loss of profits resulting from the plaintiffs being deprived of the storage of the grain as stipulated. There was allowed \$57,750 for the prospective profits of handling through grain at one cent per bushel during the period of the contract, and \$11,250 for prospective profits on storage of grain. The court say, in reference to the last item: "There is not entire certainty as to the amount that ought to be allowed, but this is no reason why none should be given. The law is satisfied with a just and true approximation to the true amount." See *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *Fultz v. Wycoff*, 25 Ind. 321; *Flick v. Wetherbee*, 20 Wis. 392; *Heard v. Holman*, 19 C. B. (N.S.) 1; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *McKnight v. Ratcliff*, 44 Pa. 156; *The Narragansett, Olcott*, 388; *Douty v. Bird*, 60 Pa. 48; *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Chapman v. Kirby*, 49 Ill. 211; *Ludlow v. Yonkers*, 43 Barb. 493; *Todd v. Minneapolis*, etc.



force when the wrong was done cannot be recovered.<sup>1</sup> A person who has been forcibly prevented from fishing in public waters may show the quantity of fish he might have caught, the value of the same, and the probable profits he would have made. As an aid in determining these questions, he may prove the quantity of fish caught in the waters from which he was excluded by the defendant.<sup>2</sup>

**§ 71. Chances for prizes and promotions.** In an [123] action against a carrier for negligently delaying the transportation of models made to compete for a prize until the award was made, the judges differed as to the measure of damages, and it was left undecided whether they should be given for the labor and materials used in making the models, or whether the chance for the prize might be taken into consideration. Patteson, J., favored the latter: "The goods were made for a specific purpose, which had been defeated by the negligence of the defendant, and they have become useless." Erle, J., said: "I have great doubts whether that chance was [124] not too remote and contingent to be the subject of damages."<sup>3</sup> In a similar case the plaintiff had delivered to the defendants, who were carriers, a box containing plans and specifications to be forwarded to a committee at a distant place, who had offered a premium of \$500 to the successful competitor for the best plans for a public building. In consequence of the defendants' negligence they were not delivered at their destination until after the premium had been awarded. There was no evidence on the part of the plaintiff to show that there was any probability that his plans would have been adopted, and there was some evidence to the contrary. On this ground it was held that the plaintiff was entitled to only nominal damages. But it was held that such proof was admissible to show the value of his opportunity to compete, and

R. Co., 39 Minn. 186, 39 N. W. Rep. 318; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. Rep. 1025, 18 L. R. A. 385; Dickinson v. Hart, 142 N. Y. 183, 36 N. E. Rep. 801; Malone v. Weill, 67 App. Div. 169, 73 N. Y. Supp. 700; Ingram v. Lawson, 6 Bing. N. C. 212; Savery v. Ingersoll, 46 Hun, 176.

<sup>1</sup> Porter v. Johnson, 96 Ga. 154, 23 S. E. Rep. 123.

<sup>2</sup> Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, — Cal. —, 72 Pac. Rep. 161.

<sup>3</sup> Watson v. Ambergate R. Co., 15 Jur. 448.

that the loss of this was the direct and immediate effect of the negligence complained of.<sup>1</sup> "It is doubtless true that in all actions for breach of contract the loss or injury must be a proximate consequence of the breach. A remote or possible loss is not sufficient for compensation. There is no measure for those losses which have no direct and necessary connection with the stipulations of the contract, or which are dependent upon contingencies other than the performance of the contract, and which are, therefore, incapable of being estimated. With no certainty can it be said that such losses are attributable to the wrongful act or omission of him who has violated his engagement. But, on the other hand, the loss of profits or advantages which must have resulted from a fulfillment of the contract may be compensated in damages when they are the direct and immediate fruits of the contract, and must, therefore, have been in the contemplation of the parties when it was made. Applying this rule to the present case, why was not the loss of the opportunity to compete for the premium (whatever may have been its value) an immediate consequence of the breach of the contract? The company undertook to transport the box to the committee appointed to award the [125] premium. The purpose of the contract was to secure to the plaintiff the privilege of competition. Certainly, he must have had that in contemplation, and, if the company was informed of the object of the transmission, the loss of this privilege was in view of both parties at the time they entered into the contract. But whether known or not by the company, the loss was an immediate consequence of the negligent breach. We do not now stop to inquire whether the defendants can be held liable for every consequence, even though immediate, which cannot reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Perhaps if the special circumstances under which the contract was made, and which occasioned special and unusual injury to attend its breach, were unknown to the party which broke it, they could not be held to make compensation for more than the amount of injury which generally results from the breach of such con-

<sup>1</sup> *Adams Exp. Co. v. Egbert*, 36 Pa. 360, 72 Am. Dec. 382.

tracts in cases unattended by any special circumstances. . . . Suppose the engagement of the company had been directly to afford to the plaintiff an opportunity to compete for the premium offered, could he, for the breach of such an agreement, recover more than nominal damages without any proof that any actual injury had resulted from the breach? We think not. To entitle a plaintiff in an action founded on a contract to recover more than nominal damages for its breach, there must always be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages; and even when there *is* some such proof and the amount is uncertain, courts have sometimes directed the jury to allow the smallest sum which would satisfy the proof.<sup>1</sup> A plaintiff claims compensation. The amount of that compensation is a part of his case. Whether, in the present case, the plaintiff sustained any actual injury depended upon the degree of probability there was that he would be a successful competitor if the contract had not been broken. If his plans were entirely defeated . . . it cannot be claimed that he was damaged. He introduced, however, no evidence to show there was the least probability that the premium would have been awarded to him had his plans been submitted to the committee in time.” [126]

Damages cannot be recovered against a telegraph company because the inaccurate transmission of a message prevented a horse from being entered in competition for a purse.<sup>2</sup> The fact that an injured person was in the line of promotion from the position of fireman to engineer cannot be considered in awarding him damages.<sup>3</sup> A person who, in connection with others, has arranged for the capture of one accused of crime and for whose arrest a reward has been offered, may recover the amount of the reward from a telegraph company which has negligently failed to deliver a message relating to the cap-

<sup>1</sup> *Lawton v. Sweeney*, 8 Jur. 964; *Clunnes v. Pezzey*, 1 Camp. 8.

<sup>2</sup> *Western U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. Rep. 719; *Hessee v. Columbus, etc. R. Co.*, 58 Ohio St. 167, 50 N. E. Rep. 354; *Bonnet v. Galveston, etc. R. Co.*, 89 Tex. 72, 33 S. W.

Rep. 334. *Contra*, *Gulf, etc. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. Rep. 558.

<sup>3</sup> *Brown v. Chicago, etc. R. Co.*, 64 Iowa, 652, 21 N. W. Rep. 193. But see ch. 36.

ture if the jury find that the arrest would have been made but for the negligence.<sup>1</sup> The defendant failed to deliver to plaintiff a message sent him by the comptroller of the currency: "Would you accept receivership of a bank named? Bond \$35,000; compensation \$200 per month, subject to future modification." Because there would have been no binding obligation, if the message had been received and an affirmative answer sent, to make the appointment there could not be a recovery.<sup>2</sup> The defeat of a candidate for office because of a slander is a damage too remote, uncertain and speculative to justify a recovery.<sup>3</sup>

**§ 72. Contingent advantage.** The fact that the value of a contract or the advantage to be derived from it is contingent — that is, that the expected advantage depends on the concurrence of circumstances subsequently to transpire, and which may by possibility not happen — is not an insuperable objection to recovering damages for its loss. The chance, so to speak, of obtaining that advantage by performance of the contract and the conjunction of the necessary subsequent facts may be valuable. The nature of the contingency must be considered. If it is purely conjectural and cannot be reasonably anticipated to happen in the usual course of things it is too uncertain. There must be proof legally tending to show and sufficient to satisfy the jury that it would happen. The chance that a father would pay a son's debt to procure his release from custody has been held capable of estimation.<sup>4</sup>

**§ 73. Uncertain mitigation of breach of marriage promise.** In assessing damages for the breach of a promise of marriage it would not be a legitimate subject for the jury to consider the consequences to the plaintiff, in mitigation of damages, of marrying the defendant and thereby forming an unhappy alliance, by reason of a want of that love and affection that a husband should bear his wife.<sup>5</sup>

**§ 74. Failure to provide sinking fund.** The damages to a creditor for the failure of a municipal corporation to fulfill its

<sup>1</sup>McPeck v. Western U. Tel. Co., 107 Iowa, 356, 78 N. W. Rep. 63, 70 Am. St. 205, 43 L. R. A. 214.

<sup>2</sup>Walser v. Western U. Tel. Co., 114 N. C. 440, 19 S. E. Rep. 366.

<sup>3</sup>Field v. Colson, 93 Ky. 347, 20 S. W. Rep. 264.

<sup>4</sup>Macrae v. Clarke, L. R. 1 C. P. 403. See § 71.

<sup>5</sup>Piper v. Kingsbury, 48 Vt. 480.

contract to provide a sinking fund as security for the debt have been held not capable in their nature of legal computation; there is no legal standard by which they can be fixed; they are shadowy, uncertain and speculative.<sup>1</sup>

## SECTION 6.

### THE CONSTITUENTS OF COMPENSATION, OR ELEMENTS OF DAMAGE.

§ 75. **Elementary limitation of damages.** The ele- [127]mentary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown except in those cases where there are no pecuniary elements or measure, and the amount of the recovery is necessarily left to the discretion of the jury, as in cases of personal injury or defamation of character.<sup>2</sup> What are the elements of injury which may be compensated? This inquiry is a legal one and must be determined by the court; where the details are capable of pecuniary valuation the law affords some standard for measuring compensation for them. The elements of damage are always correlative to the right violated by the act complained of; and the amount of compensation, whether measured by legal rules or referred to the discretion of the jury, must depend on the nature of the right and the mode, incidents and consequences of the violative act.<sup>3</sup> Each party to a contract has a legal right

<sup>1</sup> *Memphis v. Brown*, 20 Wall. 289.

<sup>2</sup> In *Scott v. Williams*, 1 Dev. 376, an action for assault and battery and false imprisonment, its object being to determine whether the plaintiff who was held as a slave was not a freeman, more than nominal damages were given, though there seems to have been no proof of the actual damages.

In *Creech v. Creech*, 98 N. C. 155, 3 S. E. Rep. 814, an action upon an apprentice bond, evidence was given to show that the health of the ap-

prentice had suffered by the master's improper treatment; but it did not appear to what extent it had been injured. It was ruled not to be error to instruct the jury that they might determine if there was damage from that cause and fix the amount.

<sup>3</sup> If land is injured by a wrongful act or taken under the power of eminent domain the owner may have his damages fixed with regard to its adaptability to any use to which it may be applied; he is not restricted

to performance by the other according to its legal import and effect. Any default is a violation of that right. The injured [128] party is entitled to a measure of compensation which will place him in as good condition as if the contract had been fulfilled. In other words, all the natural and proximate results of the act complained of will be considered with a view to giving him compensation for all gains prevented and all losses sustained. The particular stipulations of the contract and the alleged breach will circumscribe the inquiry, and the facts establishing the breach and its consequences will constitute its subjects.

§ 76. **Damages for non-payment of money.** On a contract for the mere payment of money the unpaid principal, together with the stipulated, or after maturity the lawful, rate of interest is the measure of damages. It is the invariable measure of recovery in a creditor's action against his debtor.<sup>1</sup> The failure to pay a debt when due may disappoint the creditor and embarrass him in his affairs and collateral undertakings; he may consequentially suffer losses for which interest is a very inadequate compensation; but they are remote and do not result alone from the default of his debtor. Money, like the staples of commerce, is, in legal contemplation, always in market and procurable at the lawful rate of interest; and the same principle which limits a disappointed vendee's recovery against his defaulting vendor to the market value of the com-

to such damages as it sustained for the purpose it was used when the injury was done or it was taken. *Boom Co. v. Patterson*, 98 U. S. 403; *Fort Worth, etc. R. Co. v. Wallace*, 74 Tex. 581, 12 S. W. Rep. 227; *Same v. Hogsett*, 67 Tex. 685, 4 S. W. Rep. 365. See ch. 26.

The damages for the loss of a grove wholly situated upon a part of a farm which is separated from the larger tract included in it by a railroad are to be awarded with regard to its usefulness to the whole farm. *Brooks v. Chicago, etc. R. Co.*, 73 Iowa, 179, 34 N. W. Rep. 805.

<sup>1</sup> *Fletcher v. Tayleur*, 17 C. B. 21; *Short v. Skipwith*, 1 Brock. 103; *Ben-*

*der v. Fromberger*, 4 Dall. 436; *Lou- don v. Taxing District*, 104 U. S. 771; *Hoblit v. Bloomington*, 71 Ill. App. 204; *Greene v. Goddard*, 9 Met. 212, 232; *Ladies' Building Ass'n v. Rob- bins*, 1 Mart. Ch. 134, 152; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271, 277; *South African Territories v. Wallington*, [1898] App. Cas. 309; *Henderson v. Bank of Hamilton*, 25 Ont. 641; *Bethel v. Salem Imp. Co.*, 93 Va. 354, 25 S. E. Rep. 304, 33 L. R. A. 602; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. Rep. 1033; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 45 N. E. Rep. 655; *Morrill v. Weeks*, 70 N. H. 178, 180, 46 Atl. Rep. 32.

modity which is the subject of his contract restricts the creditor to the principal and interest. The practical difficulty to a creditor of borrowing the money, where the debtor is withholding the sum he owes and which is wanted, and that of a vendee in making a new purchase, after he has paid the defaulting vendor for the goods needed, is the same. No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances.<sup>1</sup>

**§ 77. Greater damages than interest for failure to pay money.** Where the obligation to pay money is special and has reference to other objects than the mere discharge of a debt, as where it is agreed to be done to facilitate trade, and to maintain the credit of the promisee in a foreign coun- [129] try, to take up commercial paper, pay taxes, discharge liens, relieve sureties, or for any other supposable ulterior object, damages beyond interest for delay of payment, according to the actual injury, may be recovered. The contract implied between a bank and its depositors is that the former will hold the funds and pay them out on the order of the latter; for failing so to do the bank is liable either in tort or upon contract.<sup>2</sup> If the action be brought on the contract and the failure to pay was not wilful, and no special damages are proved, and the check has been paid, only nominal damages can be recovered.<sup>3</sup> If the depositor is not a trader and has made his deposit subject to special terms, on the wrongful refusal to pay him in person he can recover only interest on the amount.<sup>4</sup> He cannot recover for injury to his credit because no publicity is given to the refusal to pay.<sup>5</sup> In the absence of proof of

<sup>1</sup> Domat, B. 3, tit. 5, § 2, art. 4; *Masterton v. Mayor*, 7 Hill, 61; *Lowe v. Turpie*, 147 Ind. 652, 677, 44 N. E. Rep. 25, 37 L. R. A. 233, quoting the text; *Smith v. Parker*, 148 Ind. 127, 45 N. E. Rep. 770; *Fox v. Poor Ridge & Sugar Creek Turnpike Road Co.*, 8 Ky. L. Rep. 427 (Ky. Super. Ct.); *Hoblit v. Bloomington*, 71 Ill. App. 204; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. Rep. 571.

<sup>2</sup> *Citizens' Nat. Bank v. Importers' & Traders' Bank*, 119 N. Y. 195, 23 N. E. Rep. 540; *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun, 6, 33 N. Y. Supp. 864, affirmed without opinion, 156 N. Y. 663.

<sup>3</sup> *Burroughs v. Tradesmen's Nat. Bank*, *supra*.

<sup>4</sup> *Henderson v. Bank of Hamilton*, 25 Ont. 641.

<sup>5</sup> *Hanna v. Drovers' Nat. Bank*, 92 Ill. App. 611.

special damage a farmer whose check is not honored can recover only a nominal sum.<sup>1</sup> But a depositor who proves special damage to himself as a stock and share-broker and stock-jobber may recover very substantial damages, though he is not a trader.<sup>2</sup> One who breaks his contract to lend money at a less rate than is fixed by law is liable to the other party if he borrows elsewhere and pays a rate in excess of that fixed by such contract for the difference between such rates inside the legal rate.<sup>3</sup> Under various circumstances an enlarged liability results from the failure to pay checks of customers who have provided funds to meet them; in such cases the business standing and especially the credit of the drawers may be impaired.<sup>4</sup> In one such case for refusal to pay a check of 48¢ the jury gave a verdict of 500¢ damages, and there was no evidence that special damage had been sustained. This was deemed excessive and was reduced by consent to 200¢.<sup>5</sup> The rule of

<sup>1</sup> *Bank of New South Wales v. Milvain*, 10 Vict. L. R. (law) 3.

<sup>2</sup> *Dean v. Melbourne Stock Exchange Agency & Banking Corporation*, 16 Vict. L. R. 403. In this case the plaintiff was rendered unable to meet his business engagements and was suspended by a stock exchange of which he was a member, and suffered damage to his reputation. A judgment for 2,900¢ was sustained.

<sup>3</sup> *Gooden v. Moses*, 99 Ala. 230, 13 So. Rep. 765; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. Rep. 177; *Luce v. Hoisington*, 56 Vt. 436.

A bank agreed to advance money to a customer with knowledge of the use he designed to make of it, and subsequently refused to do so. He was unable to procure the money elsewhere and was obliged to abandon his enterprise. There was a recovery of the actual damages sustained. *Manchester & O. Bank v. Cook*, 49 L. T. Rep. 674 (1883).

<sup>4</sup> *Svensden v. State Bank*, 64 Minn. 40, 58 Am. St. 522, 31 L. R. A. 552, 65 N. W. Rep. 1086, citing the text; *Bank of Commerce v. Goos*, 39 Neb. 437, 53 N. W. Rep. 84, 23 L. R. A. 90; *Patter-*

*son v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. Rep. 632, 17 Am. St. 779; *First Nat. Bank v. Railsback*, 58 Neb. 248, 78 N. W. Rep. 512; *Marzetti v. Williams*, 1 B. & Ad. 415; *Birchall v. Third Nat. Bank*, 17 Phila. 139; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. Rep. 261, 51 L. R. A. 255; *Fleming v. Bank of New Zealand*, [1900] App. Cas. 577.

<sup>5</sup> *Rolin v. Steward*, 14 C. B. 595; *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43; *Larios v. Gurety*, L. R. 5 P. C. 346; *Prehn v. Royal Bank*, L. R. 5 Ex. 92; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. 779, 18 Atl. Rep. 632.

In *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. Rep. 917, a verdict for \$400 was sustained for a mistaken refusal to cash checks amounting to \$900.

In the absence of proof of special damage a bank which failed to pay a check sent it by mail, solely through the negligent mistake of an employee, was liable for "temperate damages;" judgment for \$200 was affirmed. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. Rep. 190, 51 Am. St. 139.



*Hadley v. Baxendale* is applied to such cases.<sup>1</sup> Bankers at Liverpool by letter of credit delivered to a customer undertook to accept drafts drawn abroad to be paid with his money deposited for that purpose. Before maturity they gave notice that they would be unable to pay the drafts at maturity and the customer was put to the expense of a commission to another party to take up the bills, of protesting them and of telegrams. These were held proper elements of damage.<sup>2</sup> In another case the defendant's failure to meet the plaintiff's drafts caused a suspension of the latter's business at one place, injured it at another, and caused the loss of a valuable agency; all resulting losses were recoverable.<sup>3</sup> The elements of damage for the non-payment of a check include time lost, expense incurred, and loss of business sustained; but punitive damages should not be allowed in the absence of proof showing actual malice, oppression or bad motive. The fact that the drawer of an unpaid check had a nervous chill in consequence of its non-payment is too remote to be considered.<sup>4</sup> The arrest and imprisonment of the drawer of a check is not a result which may be considered in awarding him compensation for the non-payment of his check.<sup>5</sup> If the plaintiff pleads and proves that

On the dishonor of a note because of the breach of an agreement to renew it, although pecuniary loss was not shown, a judgment for the plaintiff's expenses and 150% for general damages was sustained; but a recovery of 10% for attorney's expenses was disallowed. *Dowling v. Jones*, 2 N. S. W. 359.

<sup>1</sup>*Parker v. Cunningham*, 5 Vict. L. R. (law) 202, and cases cited *supra*, except *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43, in which it is suggested that it is for the jury to find whether the damages are the natural and proximate consequence of the breach of contract.

<sup>2</sup>*Prehu v. Royal Bank*, *supra*; *Urquhart v. McIver*, 4 Johns. 103; *Riggs v. Lindsay*, 7 Cranch, 500.

<sup>3</sup>*Boyd v. Fitt*, *supra*.

It is not according to the usual course of events that the refusal of

a bank to pay a note for \$517 which was payable there out of a deposit of \$611 should result in the entry of judgment for over \$8,000, and the seizure of the business of the maker of the note. *Brooke v. Tradesmen's Nat. Bank*, 69 Hun, 202, 23 N. Y. Supp. 802.

Where a check has been dishonored the plaintiff may show, as evidence of damage to his business reputation, the loss of a partnership; but such loss is too remote to be regarded as special damage. *Dyson v. Union Bank of Australia*, 8 Vict. L. R. (law) 106.

<sup>4</sup>*American Nat. Bank v. Morey*, 24 Ky. L. Rep. 658, 69 S. W. Rep. 759, 58 L. R. A. 956.

<sup>5</sup>*Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. Rep. 84, 23 L. R. A. 90.

he is a trader he may show a general impairment of his credit as the result of dishonoring his checks without alleging special damage;<sup>1</sup> but if loss of custom and credit from particular persons is relied upon it must be specially pleaded.<sup>2</sup>

Where a depositor's checks had been refused payment four times in close succession, with knowledge that his deposit was sufficient to pay them, the plaintiff recovered damages for his actual money loss because of the notice of protest and expenditures made in arranging matters after he knew of the dishonor of his checks, substantial damages for the impairment of his credit, notwithstanding he was not a trader. On this feature of the recovery it was said that plaintiff was engaged in actual business, and that it was in the course of that business that the checks had been drawn. Ordinarily, an honest man draws checks only on a bank where he has an account, and though sometimes by mistake he may draw checks when he has overdrawn his account, yet, if he does that repeatedly, any one knowing it would be sure to conceive an unfavorable opinion, not only as to his honesty, but also as to his credit; so that the act of a bank in refusing to pay its customer's checks is something more than a mere nominal breach of the contract to be paid for by requiring the bank to make good the money which its act has cost him. From these repeated refusals the jury might infer that the credit of the plaintiff was impaired thereby. A further recovery was sustained for injured feelings and mental anxiety over the matter; so far as these resulted directly and proximately from the defendant's acts if these were committed maliciously through wrongful and improper motives. As to this head the court said: As we have seen, when the *animus* is a question for the jury, they are at liberty, when they find that damages are suffered because of the tort, not only to award the actual money damages sustained, but damages for the mental suffering and anxiety which accompany the material damages resulting from the wrongful act. . . . If it can be fairly inferred that, as the result of the act, the plaintiff, who was a prosperous business man in good standing,

<sup>1</sup>J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 58 S. W. Rep. 261, 51 L. R. A. 255.      <sup>2</sup>Fleming v. Bank of New Zealand, [1900] App. Cas. 577.

has suffered damage to his credit, so that his *status* in that regard has been changed, and that has taken place because of the wrongful and intentional act of the defendant, it is not too much to infer that, as a result of that act, and the damages caused by it, the plaintiff has suffered anxiety and the feeling of humiliation which would necessarily follow the consciousness of a loss of one's business reputation. The case is quite analogous to an action of slander. It is quite true that in such a case as this the bank says nothing which can be laid hold of as the basis of the action, but by its act it affirms that the person who has drawn checks upon it has made an effort to obtain money from the bank and to impose his checks upon his neighbors with whom he deals, knowing that they would not be honored when presented; and that is substantially saying that in respect to that matter his dealing is dishonest, and necessarily impairs his credit as an honest man. The jury were, therefore, justified in considering that an act of the bank which raised an inference that the plaintiff was not an honest man, necessarily inflicted upon him that humiliation and mental anxiety which follows upon the knowledge by a man that he has been accused of the dishonest act, which the action of the bank has given rise to.<sup>1</sup> The rule which supports a recovery for the loss of credit where a bank refuses to pay a depositor's check has no application in the case of unintentional delay in the delivery of money by a telegraph company whereby the plaintiff's note was protested, unless he shows a pecuniary loss because of the protest.<sup>2</sup> Where the plaintiff gave up certain claims against the defendant as a consideration for the supply of funds by the latter for specified purposes and for a fixed time, and at the expiration of three-fourths of that time the defendant broke his contract, the plaintiff was not entitled to recover the value of such claims, the failure of consideration not being total; he did recover the expenses directly entailed upon him by the breach, a liberal sum in respect to loss and embarrassment, to avoid which he surrendered those claims, which loss and embarrassment were in the contemplation of the parties when they contracted. The first head of damage

<sup>1</sup> Davis v. Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. Supp. 764.

<sup>2</sup> Smith v. Western U. Tel. Co., 150 Pa., 561, 24 Atl. Rep. 1049.

consisted of the expense of transferring the loan, and it was allowed notwithstanding the transfer would necessarily have been made three months later.<sup>1</sup>

In order that the liability for the breach of a contract to loan money to pay an incumbrance shall exceed a nominal sum it must appear that the contract was made with knowledge of the purpose for which the money was to be used, the necessity for its use, and also that the land was lost to the owner because of the incumbrance, and without his knowledge and solely through the fault of him who was to make the loan; or, if the other person had notice of the neglect or refusal to make the loan, it came at a time when he was deprived of the opportunity to procure the money elsewhere and pay the incumbrance or redeem the land if it had been sold.<sup>2</sup> The breach of a contract to advance money and supplies to carry on a logging business, the contract having been made with knowledge that the obligee could not procure these elsewhere, renders the party guilty thereof liable for the profits which could have been made by putting logs in the market.<sup>3</sup> The general rule that a person can recover only nominal damages because of the refusal of another to advance money of which he may immediately demand the repayment,<sup>4</sup> does not apply where the circumstances indicate that the parties did not intend the transaction to be a demand loan though it was such in terms; in such a case the plaintiff may prove the damages he has sustained because of the breach of contract.<sup>5</sup>

Where one person furnishes money to another to discharge an incumbrance upon the land of the person furnishing the money, and the person undertaking to discharge it neglects to

<sup>1</sup>Parker v. Cunningham, 5 Vict. L. R. (law) 202.

On the breach of a contract to extend a loan the only damages recoverable are those represented by the difference in the rate of interest to be paid, unless the plaintiff shows his inability to obtain the money from other sources to discharge the debt which, by his default in the payment of interest, has matured. *Western U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 73, 26 S. W. Rep. 478.

<sup>2</sup>Lowe v. Turpie, 147 Ind. 652, 675, 44 N. E. Rep. 25, 37 L. R. A. 233.

<sup>3</sup>Graham v. McCoy, 17 Wash. 63, 48 Pac. Rep. 780, 49 id. 235.

<sup>4</sup>Bradford, etc. R. Co. v. New York, etc. R. Co., 123 N. Y. 316, 25 N. E. Rep. 499, 11 L. R. A. 116.

<sup>5</sup>Goldsmith v. Holland Trust Co., 5 App. Div. 104, 38 N. Y. Supp. 1032. See *Bank of Commerce v. Bright*, 23 C. C. A. 586, 77 Fed. Rep. 949.

do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished with interest, or the value of the land lost, according to circumstances.<sup>1</sup> If the land-owner has knowledge of the agent's failure in time to redeem the land himself his damages [130] will be the money furnished with interest. But if the land-owner justly relies upon his agent to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, the latter will be liable for the value of the land at the time it is lost.<sup>2</sup>

§ 78. **Liability for gains and losses.** For the breach of other contracts than to pay money the injured party is entitled to compensation for gains prevented<sup>3</sup> and losses sustained. The gains prevented are those which would accrue to the contracting parties from the mutual performance of the contract. The damages for the total breach of a contract should include the value of it to the injured party. This is generally the measure. There are some exceptions, as in case of contracts for the sale of land where title unexpectedly cannot be made, and generally on covenants for title in conveyances of real estate.<sup>4</sup>

<sup>1</sup> In actions upon covenants against incumbrances or covenants to pay off specific incumbrances, the damages are the diminution in value of the estate by reason of the incumbrances, and where the contract broken was to pay off a specific lien the owner may recover the whole amount of it, although no damage has been proved. *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Carr v. Roberts*, 5 id. 78; *Loosemore v. Radford*, 9 M. & W. 657; *Hodgson v. Wood*, 2 H. & C. 649. See *Paro v. St. Martin*, 180 Mass. 29, 61 N. E. Rep. 268.

<sup>2</sup> *Blood v. Wilkins*, 43 Iowa, 565; *Gallup v. Miller*, 25 Hun, 298.

The rule stated in the text does not apply where an individual accepts a deed for the land of another, and agrees with him to advance money to pay his debts, and to sell the land to raise money with which to repay

himself the amount thus advanced, and where, after receiving the deed, he refuses to make the advancements. The liability of such person is not for the value of the land nor the sum which was to be advanced, but for the actual damages sustained by the other party. *Turpie v. Lowe*, 114 Ind. 37, 54, 15 N. E. Rep. 834; *Stanley v. Nye*, 51 Mich. 232, 16 N. W. Rep. 387.

<sup>3</sup> See §§ 59 *et seq.*

<sup>4</sup> *Flureau v. Thornhill*, 2 W. Bl. 1078; *Worthington v. Warrington*, 8 C. B. 134; *Buckley v. Dawson*, 4 Ir. C. L. (N. S.) 211; *Sikes v. Wild*, 1 B. & S. 594; *Bain v. Fothergill*, L. R. 6 Ex. 59, L. R. 7 Eng. & Irish App. 158; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Conger v. Weaver*, 20 N. Y. 140; *Pumpelly v. Phelps*, 40 id. 60; *Sweem v. Steele*, 5 Iowa, 352; *Drake v. Baker*, 34 N. J. L. 358; *Vio-*

By this general rule the party thus injured by a total breach is entitled to recover the profits of the particular contract which he shows, with sufficient certainty, would have accrued if the other party had performed. He is entitled to recover proportionately for a partial breach. And to ascertain these profits the nature and the special purpose of the contract, a subcontract, or other subsidiary and dependent arrangement, within the contemplation of the parties at the time of contracting, may be taken into consideration.<sup>1</sup> The objection

*Iet v. Rose*, 39 Neb. 661, 58 N. W. Rep. 216. See ch. 13.

<sup>1</sup> *Mason v. Alabama Iron Co.*, 73 Ala. 270; *Jones v. Foster*, 67 Wis. 296, 30 N. W. Rep. 697; *Cameron v. White*, 74 Wis. 425, 43 N. W. Rep. 155, 5 L. R. A. 493; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. Rep. 896; *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. Rep. 609; *Morgan v. Hefler*, 68 Me. 131; *Hadley v. Baxendale*, 9 Ex. 341; *McHose v. Fulmer*, 73 Pa. 365; *Van Arsdale v. Rundel*, 82 Ill. 63; *True v. International Tel. Co.*, 60 Me. 9; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Cassidy v. Le Fevre*, 45 id. 562; *Hexter v. Knox*, 63 id. 561; *Frye v. Maine Central R. Co.*, 67 Me. 414; *Fultz v. Wycoff*, 25 Ind. 321; *Holden v. Lake Co.*, 53 N. H. 552; *Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Fox v. Harding*, 7 Cush. 516; *Fletcher v. Tayleur*, 17 C. B. 21; *Masterton v. Mayor*, 7 Hill, 61; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Pas-singer v. Thorburn*, 34 N. Y. 634; *Smith v. Chicago, etc. R. Co.*, 38 Iowa. 518; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Ferris v. Comstock*, 33 Conn. 513; *France v. Gaudet*, L. R. 6 Q. B. 199; *Richmond v. D. & S. C. R. Co.*, 40 Iowa, 264; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Burrell v. New York, etc. Co.*, 14 Mich. 34; *Maynard v. Pease*, 99-Mass. 555; *Bell v. Cunningham*, 3 Pet. 69; *Farwell v. Price*, 30 Mo. 587;

*James H. Rice Co. v. Penn Plate Glass Co.*, 88 Ill. App. 407, citing the text; *Smith v. Los Angeles & P. R. Co.*, 98 Cal. 210, 33 Pac. Rep. 53; *Post v. Davis*, 7 Kan. App. 217, 52 Pac. Rep. 903; *McNeill v. Richards*, [1899] 1 Irish, 79; *Consolidated Coal Co. v. Schneider*, 93 Ill. App. 88, citing the text; *Curry v. Kansas, etc. R. Co.*, 58 Kan. 6, 48 Pac. Rep. 579. 61 Kan. 541, 60 Pac. Rep. 325; *Watson v. Needham*, 161 Mass. 404, 37 N. E. Rep. 204, 24 L. R. A. 287; *Knowles v. Steele*, 59 Minn. 452, 61 N. W. Rep. 557; *Farr v. Griffith*, 9 Utah, 416, 35 Pac. Rep. 506, citing the text; *Kendall Bank Note Co. v. Commissioners of Sinking Fund*, 79 Va. 563; *Bratt v. Swift*, 99 Wis. 579, 75 N. W. Rep. 411; *Crosby Lumber Co. v. Smith*, 2 C. C. A. 97, 51 Fed. Rep. 63; *Tinsley v. Jemison*, 20 C. C. A. 371, 74 Fed. Rep. 177; *Lindsay v. Stevenson*, 17 Vict. L. R. 112; *Marcus v. Myers*, 11 T. L. Rep. 327.

*In- Pell v. Shearman*, 10 Ex. 766, the defendant covenanted with the plaintiff that if he would surrender to his lessor a certain lease' they would, within two years or such period as should be agreed in a new lease, which the lessor had agreed to grant them, sink upon the demised premises a pit to the depth of one hundred and thirty yards for the purpose of finding coal, and, in case a marketable vein of coal should be reached, pay the plaintiff 2,500L,

that the nature of the business to which the contract has reference and in which profits might have been earned furnishes no reasonable basis upon which to make an estimate of loss is not controlling where the contract sued upon, or the collateral contract, if, in the latter case, the defendant is responsible for its breach, consists of an undertaking to do specific work for a specified price, although in the performance of that work machinery as well as labor may be employed and the weather may affect the profits by interfering with the work.<sup>1</sup>

§ 79. **What losses elements of damage.** Losses, aside from gains prevented, may be sustained in various ways in consequence of the breach of a contract. First, a loss may consist of money, property or valuable rights which may be directly taken from the injured party by the breach.<sup>2</sup> A servant improperly discharged before the period of his engagement has expired and unable to find any other employment, or one equally remunerative, is thereby deprived of the right to earn the stipulated wages. By that breach of contract he loses the whole or a part of what he was entitled to earn during the term he was engaged for, and he is entitled to recover accordingly.<sup>3</sup> An agent or bailee who, by breach of duty, converts

There was a breach of the contract, and evidence showing a reasonable probability that if the pit had been sunk such coal would have been discovered. Plaintiff's measure of damage was the amount of his loss by being deprived of the opportunity to find coal.

Machinery put into a mill failed to possess the capacity as to the quantity and quality of flour it was warranted to produce. The damages were measured by the amount paid upon it, the loss by reason of its defects, and the cost incurred in repairing the mill and putting it in condition to produce the quantity and quality of flour stipulated for. *Pennypacker v. Jones*, 106 Pa. 237.

<sup>1</sup> *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. Rep. 25.

<sup>2</sup> *Smith v. Los Angeles & P. R. Co.*, 98 Cal. 210, 33 Pac. Rep. 53.

<sup>3</sup> *Paola Gas Co. v. Paola Glass Co.*,

56 Kan. 614, 44 Pac. Rep. 621, 54 Am. St. 598; *Hughes v. Robinson*, 60 Mo. App. 194; *Athletic Baseball Ass'n v. St. Louis Sportsman's P. & C. Ass'n.*, 67 Mo. App. 653; *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. Rep. 456; *Friedland v. Myers*, 139 N. Y. 432, 34 N. E. Rep. 1055; *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288; *Wells v. National L. Ass'n*, 39 C. C. A. 476, 99 Fed. Rep. 222; *Sutherland v. Wyer*, 67 Me. 64; *Gifford v. Waters*, 67 N. Y. 80; *Gillis v. Space*, 63 Barb. 177; *Emerson v. Howland*, 1 Mason, 45; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *Williams v. Anderson*, 9 Minn. 50; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Smith v. Thompson*, 8 C. B. 44.

The measure of damages recoverable from the usurper of an office is the salary or emoluments received. *Palmer v. Darby*, 64 Ohio St. 520, 60 N. E. Rep. 626.

his principal's property, or by neglect suffers it to be lost or destroyed, or by failure to assert his rights or by doing it in a careless or inefficient manner subjects him to loss, must respond in damages according to the injury thus occasioned.<sup>1</sup> In some cases such losses are the measure of recovery, as where there is a breach of contract by one person to adopt another and make him his heir. The value of the services rendered or outlay incurred on the faith of the promise, and not the value of the promised share of the estate, measures the recovery.<sup>2</sup> And when a lessee occupies premises for the entire term, but is compelled to pay more rent than was stipulated for, he may recover the excess.<sup>3</sup> The same rule applies in tort actions, as where egress and ingress is cut off from adjacent lands or water is caused to run or stand on them, the recovery is measured by the expense of remedying the wrong.<sup>4</sup> One who breaches his contract to permit the owner of mortgaged lands to redeem them after foreclosure and sale by selling the same to innocent purchasers is liable for the value of the lands in excess of the mortgage debt, including foreclosure costs; if but a small part of the lands were sold at the time suit was begun, the remainder not being thereby depreciated in value, he is liable for the value of those sold and the plaintiff may recover those unsold upon payment of the mortgage debt and charges; if the defendant continued to sell the remaining lands after suit was begun he is responsible for their value, unless the plaintiff elected to proceed against the purchasers, who were not entitled to the rights of innocent holders.<sup>5</sup>

<sup>1</sup> *White v. Smith*, 54 N. Y. 522; 132; *Lilley v. Doubleday*, 7 Q. B. Div. Dodge v. Perkins, 9 Pick. 368; *Clark* 510.

*v. Moody*, 17 Mass. 145; *Frothingham v. Everton*, 12 N. H. 239; *Webster v. De Tastet*, 7 T. R. 157; *Blot v. Boiceau*, 3 N. Y. 78; *Maynard v. Pease*, 99 Mass. 555; *Stearine, etc. Co. v. Heintzmann*, 17 C. B. (N. S.) 56; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555; *Mallough v. Barber*, 4 Camp. 150; *Nickerson v. Soesman*, 98 Mass. 364; *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dill. 290; *De Tastet v. Crousillat*, 2 Wash. C. C.

<sup>2</sup> *Sandham v. Grounds*, 36 C. C. A. 103, 94 Fed. Rep. 83; *Graham v. Graham*, 34 Pa. 475, overruling *Jack v. McKee*, 9 Pa. 240; *Kauss v. Rohner*, 172 Pa. 481, 33 Atl. Rep. 1016, 51 Am. St. 762.

<sup>3</sup> *Myers Tailoring Co. v. Keeley*, 58 Mo. App. 491.

<sup>4</sup> *Louisville & N. R. Co. v. Finley*, 7 Ky. L. Rep. 129 (Ky. Super. Ct.).

<sup>5</sup> *Silliman v. Gano*, 90 Tex. 637, 39 S. W. Rep. 559.



§ 80. Same subject; labor and expenditures. Second, losses sustained may consist of labor or expenditures prudently incurred in preparation to perform or in part performance of the contract on the part of the plaintiff. Where a contract is partly performed by one party and, without his being in any default, the other stops him and prevents further performance, such part performance, in addition to the profits which could be made by completing the contract, will enter into the estimate of damages for such breach. Should a vendor who had received part payment for goods bargained and sold refuse to go on with the contract the vendee would be entitled to [132] recover, in addition to the profits — the excess of the value of the goods above the contract price — the amount which he had paid towards the latter, for the same reason which supports his claim where he has paid the whole purchase price for the value of the property.<sup>1</sup> If a contract for particular work is partly performed and the employer then puts an end to the undertaking recovery may be had against him, not only for the profits the contractor could have made by performing the contract, but compensation also for so much as he has done towards performance.<sup>2</sup> Preparations for performance, which were a necessary preliminary to performance or within the contemplation of the parties as necessary in the particular case, rest upon the same principle.<sup>3</sup> Maintaining a shop and waiting

<sup>1</sup> *Copper Co. v. Copper Mining Co.*, 33 Vt. 92; *Woodbury v. Jones*, 44 N. H. 206; *Owen v. Routh*, 14 C. B. 327; *Bush v. Canfield*, 2 Conn. 485; *Loder v. Kekule*, 3 C. B. (N. S.) 128; *Smith v. Berry*, 18 Me. 122; *Berry v. Dwinel*, 44 Me. 255; *Wyman v. American Powder Co.*, 8 Cush. 168; *Pinkerton v. Manchester & L. R.*, 42 N. H. 424.

<sup>2</sup> *McCullough v. Baker*, 47 Mo. 401; *Jones v. Woodbury*, 11 B. Mon. 167; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80; *Friedlander v. Pugh*, 43 Miss. 111; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Danforth v. Walker*, 37 Vt. 239.

<sup>3</sup> *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Hale v. Hess*, 30 Neb. 42, 58, 46 N. W. Rep. 261

(quoting the two preceding propositions, but allowing profits only under the circumstances); *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. Rep. 255; *Friedland v. Myers*, 139 N. Y. 433, 34 N. E. Rep. 1055; *Nelson v. Hatch*, 70 App. Div. 206, 75 N. Y. Supp. 389; *Griffin v. Sprague Electric Co.*, 116 Fed. Rep. 749; *Masterton v. Mayor*, 7 Hill. 61. In the last case the marble at the quarry was taken into account in the estimate of damages.

In *Nurse v. Barnes*, T. Raym. 77, the defendant, in consideration of 10*l.*, promised to demise a mill to the plaintiff, who laid in a large stock to employ it, which he lost, because the defendant refused to give him

for orders which are due under a contract is the equivalent of an expenditure under this principle.<sup>1</sup> If, by partial performance of the contract, a contractor has enjoyed a part of the benefits of his expenditure for full performance, the damages he is entitled to are proportionately lessened.<sup>2</sup>

possession. A verdict of 500*l.* was approved. The stock so procured may more properly be classed as an expenditure on the faith of performance by the other party. See § 81. But the allowance of a loss for such expenditures rests on a similar principle.

In *Skinner v. Tinker*, 34 Barb. 333, an action was brought to recover damages for the breach of a contract for a partnership. The plaintiff, a dentist of Brooklyn, and the defendant, a dentist of Havana, Cuba, entered into an agreement, in writing, at the latter place, in March, 1853, by which they were to do a joint business as dentists at Havana, to begin in October or November following, if the plaintiff should present himself. The agreement was silent as to the duration of the partnership. Thereupon the plaintiff sold his business at Brooklyn and entered into bonds not to resume practice there, and made all preparations for carrying out his agreement. In May he received a letter from the defendant, declining to carry out the agreement on his part. On the trial the plaintiff proved these facts, and his readiness and an offer to fulfill, and recovered a verdict for \$4,000. On appeal Ingraham, J., said: "Performance on the part of the plaintiff by appearing in Havana, in October or November, as stated in the contract, was unnecessary because the defendant had given notice of his determination not to form a partnership. The plaintiff was then entitled to damages, if

any were sustained, up to that time, but not to prospective damages."

*Johnson v. Arnold*, 2 Cush. 46, was an action to recover damages for the breach of a special contract by which, upon certain terms, the defendant agreed to furnish and keep the plaintiff supplied with a stock of goods for carrying on business in the defendant's store in another state, and the plaintiff undertook to carry it on for a share of the profits for a given term. It was held that in estimating the damages it was competent to allow the plaintiff compensation for the loss of his time and for the expenses of removing his family to and from the place where the business was to be carried on.

*Noble v. Ames Manuf. Co.*, 112 Mass. 492, is apparently not consistent with the principle stated. The defendant, doing business in Massachusetts, wrote the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year." The plaintiff accepted the proposition and came, but the defendant refused to employ him. The court rejected the claim of compensation for the time and expenses in coming from the Sandwich Islands on the ground that those items preceded the taking effect of the contract, and were not in part performance. Morton, J., said: "All the plaintiff can claim is that he should be placed in as good condition as he would have been in if the contract had been performed. But the ruling

<sup>1</sup> *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 90, 61 N. E. Rep. 825.

<sup>2</sup> *O'Connell v. Rosso*, 56 Ark. 603, 20 S. W. Rep. 531.

### § 81. Same subject; damages by relying on performance.

Third, such losses may consist of expenditures made by [133] one party to a contract and damages from his own acts done on the faith of its being performed by the other, in furtherance of the object for which the contract purports to be [134] made, or the object which was in the contemplation of the parties at the time of contracting.<sup>1</sup> Such losses cannot be re-

(allowing these items) puts him in a better condition." On the trial those were the only items claimed. It was stated by the plaintiff's counsel that no claim was made for business sacrifices in leaving the Islands and coming to the defendant to perform the contract, and none for any loss of time or other loss or damage after the refusal of the defendant to employ him.

The contrary view is expressed in *Moore v. Mountcastle*, 72 Mo. 605, where plaintiff was allowed to recover for loss of time and expense in going to perform a contract. The expense incurred in taking another person with him to assist in the work he was to do was disallowed. His personal expenses and the loss of his time were "such damages as may be presumed necessarily to have resulted from the breach of the contract," and hence did not need to be specially pleaded.

In *Smith v. Sherman*, 4 Cush. 408, it was held that loss of time and expenses incurred in preparation for marriage are directly incidental to the breach of the marriage promise.

In *Durkee v. Mott*, 8 Barb. 423, on a contract to pay a certain price for rafting logs which the defendant put an end to before the labor began, it was held the plaintiff might recover the immediate loss in preparing to perform the contract by providing men for that purpose.

*Woodbury v. Jones*, 44 N. H. 206, affirms the same doctrine. There the defendant proposed to the plaintiff,

who was then living in Minnesota, that if he would come back to N. B. he might move into the defendant's house, and he would give the plaintiff and his wife a year's board, and he might carry on the defendant's farm on any terms he might elect. He accepted, and came back; defendant failed to make his offer good; the court held that it was competent for the jury to take into consideration in assessing the damages the expenses of removing to N. B.

In an action against the proprietor of a school for the breach of a contract to employ the plaintiff as a teacher, made for her by her father during her absence in Europe, the plaintiff was held not entitled to recover as part of her damages the expenses of her journey home, it not appearing that they were incurred in consequence of the contract, or were in the contemplation of the parties when it was made. *Benziger v. Miller*, 50 Ala. 206. See *Williams v. Oliphant*, 3 Ind. 271; *Bulkley v. United States*, 19 Wall. 37; *Dillon v. Anderson*, 43 N. Y. 231; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 416.

<sup>1</sup> *Wolters v. Schultz*, 1 N. Y. Misc. 196, 21 N. Y. Supp. 768; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620, 76 N. W. Rep. 142; *Cole v. Stearns*, 23 App. Div. 446, 48 N. Y. Supp. 318; *People's Building, Loan & Savings Ass'n v. Pickerell*, 21 Ky. L. Rep. 1386, 55 S. W. Rep. 194; *Kelly v. Davis*, 9 Ky. L. Rep. 647 (Ky. Super. Ct.); *Dean v. White*, 5 Iowa, 266; *Grand Tower Co. v. Phillips*, 23 Wall. 471;

covered if incurred after notice of the refusal of the other party to perform the contract.<sup>1</sup>

§ 82. Same subject ; liability to third persons ; covenants of indemnity. Fourth, such losses may consist of sums necessarily paid to third persons, or of sums recovered and expenses incurred in actions brought by third persons in consequence of the defendant's breach of contract. They are those losses [135] which may result from suretyship or the breach of any duty or obligation of indemnity.<sup>2</sup> In such cases the practical question will always be what the plaintiff was obliged or authorized to pay both in respect to the principal and incidental costs or expenses. If there has been a voluntary payment by the indemnified party or a compulsory payment resulting from

Driggs v. Dwight, 17 Wend. 71, 31 Am. Dec. 283; Bunney v. Hopkinson, 1 L. T. (N. S.) 53; Smith v. Green, 1 C. P. Div. 92; Randall v. Newson, 2 Q. B. Div. 102; Leffingwell v. Elliott, 10 Pick. 204; Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403; Thomas v. Dingley, 70 Me. 100, 35 Am. Rep. 310; Randall v. Raper, E. B. & E. 84; Borradaile v. Brunton, 8 Taunt. 535; Brown v. Edgington, 2 M. & G. 279; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Johnson v. Meyer's Ex'r, 34 Mo. 255; Rowland's Adm'r v. Shelton, 25 Ala. 217; Ferris v. Comstock, 33 Conn. 513; Zuller v. Rogers, 7 Hun. 540; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Reggio v. Braggiotti, 7 Cush. 166; Jeter v. Glenn, 9 Rich. 374; Skagit R. & L. Co. v. Cole, 2 Wash. 57, 25 Pac. Rep. 1077; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. Rep. 255. See Mason v. Alabama Iron Co., 73 Ala. 270.

<sup>1</sup> James H. Rice Co. v. Penn Plate Glass Co., 88 Ill. App. 407.

<sup>2</sup> Rogers v. Riverside Land & Irrigating Co., 132 Cal. 9, 64 Pac. Rep. 35; Mowbray v. Merryweather, [1895] 1 Q. B. 57, [1895] 2 id. 640; French v. Parish, 14 N. H. 496; Newburgh v. Galatian, 4 Cow. 340; Holdgate v. Clark, 10 Wend. 215; Lincoln v.

Blanchard, 17 Vt. 464; Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690; Westervelt v. Smith, 2 Duer, 449; Illies v. Fitzgerald, 11 Tex. 417; Braman v. Dowse, 12 Cush. 227; Spear v. Stacy, 26 Vt. 61; Howard v. Lovegrove, L. R. 6 Ex. 43; Finckh v. Evers, 25 Ohio St. 82; Webb v. Pond, 19 Wend. 423; Rockfeller v. Donnelly, 8 Cow. 623; Warwick v. Richardson, 10 M. & W. 284; Gerrish v. Smyth, 10 Allen, 303; Ray v. Clemens, 6 Leigh, 600; Kip v. Brigham, 6 Johns. 158; Colter v. Morgan's Adm'r, 12 B. Mon. 278; Lowell v. Boston, etc. R. Co., 23 Pick. 24; Baynard v. Har- rity, 1 Houst. 200; Robbins v. Chi- cago, 4 Wall. 657; Crawford v. Turk, 24 Gratt. 176; Duxbury v. Vermont, etc. R. Co., 26 Vt. 751; Annett v. Terry, 35 N. Y. 256; Spalding v. Oakes, 42 Vt. 343; Chamberlain v. Beller, 18 N. Y. 115; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Propri- etors of L. & C. v. Lowell Horse R. Co., 109 Mass. 221; Briggs v. Boyd, 37 Vt. 534; Colburn v. Pomeroy, 44 N. H. 19; Thomas v. Beckman, 1 B. Mon. 31; Robertson v. Morgan's Adm'r, 3 id. 309; Littleton v. Rich- ardson, 32 N. H. 59; Gibson v. Love, 2 Fla. 598.

a suit by which the indemnitor is not bound by his contract or in consequence of the lack of notice to defend, the question of the liability of the indemnified party to make such payment is, according to some authorities, open in his action for indemnity.<sup>1</sup>

In a recent case<sup>2</sup> a contractor for machinery supplied an article made for him by the defendant. It was defectively constructed and in consequence the plaintiff was subjected to a judgment for damages resulting from the breaking of that article, such judgment being rendered in Canada. No offer of the defense of the action on which such judgment was rendered was made to the plaintiff. The conclusion of the court was that where a subvendee or a subcontractor has a legal claim for indemnification, and has, under fear of the consequences, made an adjustment or been compelled to yield to a judgment under circumstances indicating good faith and a reasonable amount of resistance, the amount thus determined, either by the adjustment or by the litigation, becomes evidence of the amount of damages to be awarded against the principal contractor.<sup>3</sup> This conclusion was aside from the question whether the judgment should stand as of conclusive effect or only *prima facie* evidence as to the measure of damages. If there is an express indemnity against the result of a particular suit, whether the indemnitor is a party or not, the judgment binds him for the purposes of that contract.<sup>4</sup> But under a general covenant of indemnity against suits the covenantor has a right to defend either in the action against the indemnified party or in the latter's action upon the covenant of indemnity. There is a marked distinction between covenants which stipulate against the consequences of a suit and those which contain no such undertaking. In the latter class the judgment is *res inter alios acta*, and proves nothing except *rem ipsam* against the

<sup>1</sup> Douglas v. Howland, 24 Wend. 35; Lee v. Clark, 1 Hill, 56; Duffield v. Scott, 3 T. R. 374; Aberdeen v. Blackmar, 6 Hill, 324; Rapelye v. Prince, 4 Hill, 119, 40 Am. Dec. 267.

<sup>2</sup> Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 91 Fed. Rep. 213.

<sup>3</sup> Citing Smith v. Compton, 3 B. & Ad. 407, and the text.

<sup>4</sup> Patton v. Caldwell, 1 Dall. 419; Rapelye v. Prince, 4 Hill, 119, 40 Am. Dec. 267; Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690.

indemnitor, unless he has had notice and an opportunity to defend. The want of notice does not go to the cause of action; the judgment is *prima facie* evidence only against the indemnitor and he is at liberty to defend against the demand on which it is founded.<sup>1</sup> If notice is expressly stipulated for the want of it will defeat the action.<sup>2</sup>

[136] As to the right to costs and expenses of defending a former suit brought to enforce a liability, against which there is an agreement or duty to indemnify, there is some conflict of decision. If a surety for a liquidated debt is sued upon it he is not bound to pay it to save costs; and he may recover of the principal the costs which he is compelled to pay as incident to a default judgment, and, in addition, the sum he is obliged to pay of the debt.<sup>3</sup> And where the action is founded on a disputable liability or an unliquidated demand the rule in England, and generally in this country, allows the surety or indemnified party to give notice of the suit to the party ultimately liable and abide his directions; if he gives none, to make no defense; or if the facts are such as to render some defense reasonable and judicious and there is a probability of success, he is at liberty to defend; and such costs and expenses as are reasonable and incurred in good faith he will be entitled to recover as part of his indemnity. He may recover not only the costs taxed against him by the prevailing adverse party, but the costs of his defense.<sup>4</sup> A man has no right, merely be-

<sup>1</sup> Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Smith v. Compton, 2 B. & Ad. 407; Reggio v. Braggiotti, 7 Cush. 166; Marlatt v. Clary, 20 Ark. 251; Boyd v. Whitfield, 19 Ark. 447; Col-lingwood v. Irwin, 3 Watts, 306; Paul v. Witman, 3 W. & S. 407; Pitkin v. Leavitt, 13 Vt. 379; Train v. Gold, 5 Pick. 380; Baynard v. Harrity, 1 Houst. 200.

<sup>2</sup> Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275.

<sup>3</sup> Hulett v. Soullard, 26 Vt. 295; Kemp v. Finden, 12 M. & W. 421; Ex parte Marshall, 1 Atk. 262; Baker v. Martin, 3 Barb. 634; Elwood v. Deifendorf, 5 Barb. 412; Bleaden v. Charles, 7 Bing. 246; Holmes v.

Weed, 24 Barb. 546; Wynn v. Brooke, 5 Rawle, 106; McKee v. Campbell, 27 Mich. 497; Wright v. Whiting, 40 Barb. 240; Wallace v. Gilchrist, 24 Up. Can. C. P. 40; Craig v. Craig, 5 Rawle, 91; Robertson v. Morgan's Adm'r, 3 B. Mon. 307; Colter v. Same, 12 id. 278. See Pierce v. Williams, 23 L. J. (Ex.) 322.

<sup>4</sup> Duxbury v. Vermont Central R. Co., 26 Vt. 751; Smith v. Compton, 3 B. & Ad. 407; Pitkin v. Leavitt, 13 Vt. 379; Hayden v. Cabot, 17 Mass. 169; Wynn v. Brooke, 5 Rawle, 106; New Haven & N. Co. v. Hayden, 117 Mass. 433; Bonney v. Seely, 2 Wend. 481; Howard v. Lovegrove, L. R. 6 Ex. 43; Ottumwa v. Parks, 43 Iowa,

cause he has an indemnity, to defend a hopeless action and put the person guarantying to useless expense.<sup>1</sup> The rule formerly laid down was that if the defendant in the first action placed the facts before the person whom he sought ultimately to charge, and that person declined to intervene and left him to take his own course, it would be a question for the jury whether it was reasonable to defend or whether the de- [137] fense was conducted in a fair manner; in deciding that question the jury would have to consider whether it was more prudent to settle the matter by compromise, pay the money into court, or let judgment go by default.<sup>2</sup> And this is still probably the law. An agent, surety, or one expressly indemnified in respect to the liability sought by action to be fixed on him, who relies on the indemnity for security against loss, has no personal interest to defend where he can connect the indemnitor with that action so as to conclude him. But where notice cannot be given or for any reason is omitted, the defendant who depends on another for indemnity must necessarily so far defend the action as to obtain the best practicable assurance that the amount which he pays he will have a legal right to have reimbursed.

**§ 83. Same subject; indemnity to municipalities; counsel fees.** Municipal corporations charged with the duty of keeping public ways in repair have a right of indemnity against parties contracting to perform this duty if they fail to fulfill; and against parties who, by abuse of license or tortiously, put such ways out of repair, when such corporations have been compelled to pay damages to some person injured in consequence of such defect or want of repair.<sup>3</sup> The corporation, not being

119; *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35; *Collen v. Wright*, 7 El. & Bl. 301; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Aguis v. Great Western Colliery Co.*, [1899] 1 Q. B. 413.

But if the action is to enforce an unliquidated demand and the person against whom the judgment has been rendered has had no opportunity to defend it, he is not liable for the costs and expenses of the defense made by the person against whom

the judgment was rendered. *Nashua Iron & Steel Co. v. Brush*, 33 C. C. A. 456, 91 Fed. Rep. 213.

<sup>1</sup> *Wrightup v. Chamberlain*, 7 Scott, 598; *Kiddle v. Lovett*, 16 Q. B. Div. 605; *Gillett v. Rippon*, *Moody & M.* 406.

<sup>2</sup> *Mayne on Dam.*, 6th ed., p. 95; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227.

<sup>3</sup> *Rochester v. Montgomery*, 72 N. Y. 65; *Port Jervis v. First Nat. Bank*, 96 id. 550; *Chicago v. Robbins*, 2

*in pari delicto*, is not subject to the principle which excludes contribution or indemnity between wrong-doers, and has a right of recovery over against the party by whose fault the injury was suffered. Where notice has been given to the person primarily at fault to take upon himself the defense, he is bound by the judgment as to the damages paid and costs.<sup>1</sup> In such cases [138] the demands for damages are unliquidated and generally disputable, and a defense would be proper and judicious, whether the party ultimately liable has notice and assumes it or not. The costs taxed against the corporation, where a reasonable defense is made, in case of recovery, and the expense of the defense, including counsel fees, are proper items of damage for which it may claim indemnity. They are among the direct consequences of the defendant's fault and the breach of the implied promise or duty to save harmless.

In a Massachusetts case<sup>2</sup> Lord, J., said: "The difficulty is not in stating the rule of damages, but in determining whether in the particular case the damages claimed are within the rule. Natural and necessary consequences are subjects of damages; remote, uncertain and contingent consequences are not. Whether counsel fees are natural or necessary, or remote and contingent, in a particular case, we think may be determined upon satisfactory principles; and, as a general rule, when a party is called upon to defend a suit founded upon a wrong for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another against whom he had a remedy over, counsel fees are the natural and reason-

Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333; *Stoughton v. Porter*, 13 Allen, 191; *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678; *Lowell v. Boston, etc. R. Co.*, 23 Pick. 24; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Ottumwa v. Parks*, 43 Iowa, 119; *Duxbury v. Vermont Central R. Co.*, 26 Vt. 751; *Littleton v. Richardson*, 32 N. H. 59; *Proprietors of L. & C. v. Lowell H. R. Co.*, 109 Mass. 221; *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. Rep. 319.

<sup>1</sup> *Id.*; *Mayor v. Brady*, 151 N. Y. 611, 45 N. E. Rep. 1122.

In *Ottumwa v. Parks*, 43 Iowa, 119, where the party sought to be made liable to the city assumed the defense of the action against it, the taxable costs of that action were allowed so far as they were paid by the city; but the costs of an appeal were disallowed, there being no evidence that the appeal was taken at the defendant's request.

<sup>2</sup> *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.



ably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract or for his own misfeasance, though he may have a remedy against another, and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable."<sup>1</sup> It appears to the writer that such expenses being recognized as not remote and contingent, the test here given for their allowance or rejection is not sound. They were allowed in that case, the plaintiff, a municipal corporation, having defended a suit for damages brought against it for a defect in a sidewalk caused by the defendant; but by the rule laid down, an innocent agent who does at the request of his principal a wrongful and injurious act, on being sued therefor would have no recourse for fees of counsel employed to defend that action.<sup>2</sup>

<sup>1</sup> In *Chase v. Bennett*, 59 N. H. 394, an action for neglect of a clerk to index a mortgage, whereby the plaintiff was induced to take a mortgage of the property supposing it to be unincumbered, it was held that counsel fees paid in defending a suit by the prior mortgagee for the property were not damages for which the defendant was liable because they were not the natural and reasonable consequence of his neglect, and because he was not notified to defend that suit.

Such fees are not recoverable against the person liable over for a defect in a highway. *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 500, 57 S. W. Rep. 319.

<sup>2</sup> See *Howe v. Buffalo, etc. R. Co.*, 37 N. Y. 297.

In *Reggio v. Braggiotti*, 7 Cush. 166, the defendant sold to the plaintiff an article which he warranted to be one known in commerce as opium, with a view of its being sold as such; but it was not opium, or of any value; the plaintiff having sold with like warranty, relying on the

defendant's warranty, had been sued by his vendee and compelled to pay damages and costs; he gave the defendant notice of that suit and requested him to defend it, and incurred large expense in and about it. *Shaw, C. J.*, said: "As they (the plaintiffs) gave notice to the defendants of the pendency of the first action, they are entitled to recover their taxable costs. See *Coolidge v. Brigham*, 5 Met. 68. But the counsel fees cannot be allowed. They are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs." Counsel fees are here treated as in some sense uncertain in amount, and for this reason the party having a right of recovery over should not impose such a charge; but it is not correct to say that such services are so uncertain in value as to be inca-

And yet in this opinion the learned judge says: "Within this [139] rule a master who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses, including counsel fees, if notified to defend the suit." Where there is an implied or express indemnity which covers the consequences of being sued and having to defend an action, all the usual concomitants of such a situation are necessarily within the contemplation of the parties; and if there is no objection of improvidence or bad faith the expense of counsel is obviously as proper to be allowed as the fees of witnesses, the clerk of the court or the sheriff. Davis, J.,<sup>1</sup> said, speaking generally: "All the cases recognize fully the liability of the principal where the relation of master and servant or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes."<sup>2</sup>

§ 84. Same subject; liability for losses and expenses. In cases of express indemnity or where there is a duty of that [140] nature springing from those relations the obligation is

pable of being estimated. Nor is it satisfactory reasoning that because the charges of counsel vary no allowance whatever should be made for such an expense when it is among the natural and proximate consequences of the breach of contract. It was obviously as natural and proximate a consequence as the other expenses of the suit.

<sup>1</sup> Chicago v. Robbins, 2 Black, 418.

<sup>2</sup> See *Randell v. Trimen*, 18 C. B. 786; *Moule v. Garrett*, L. R. 7 Ex. 101; *Baxendale v. London, etc. R.*, L. R. 10 Ex. 35; *Fisher v. Val de Travers Asphalte Co.*, 1 C. P. Div. 511; *Morsle-Blanch v. Wilson*, L. R. 8 C. P. 227; *Randall v. Raper*, 96 Eng. C. L. 84; *Richardson v. Dunn*, 8 C. B. (N. S.) 655; *Ronneberg v. Falkland Islands Co.*, 17 id. 1; *Brown v. Haven*, 37 Vt. 439; *Neale v. Wyllie*, 3 B. & C. 533; *Lewis v. Peake*, 7 Taunt. 153;

*Pennell v. Woodburn*, 7 C. & P. 117; *Penley v. Watts*, 7 M. & W. 601; *Jones v. Williams*, id. 493; *Walker v. Hatton*, 10 id. 249; *Smith v. Howell*, 6 Ex. 730.

In *Kiddle v. Lovett*, 16 Q. B. Div. 605, a platform put up under contract, for the plaintiff by the defendant, to enable the former to paint a house, fell because of defective construction and hurt a workman in the plaintiff's employ. The latter settled an action brought by his employee, and then sued defendant. The latter was held liable for nominal damages for the breach of his contract; but inasmuch as the plaintiff had employed a competent contractor to build the platform and was free from negligence, he was not liable to the injured man and the amount paid him could not be recovered from the defendant.

directly to reimburse expenses and losses; they are the immediate subjects of the contract or duty rather than the damages for the breach of either. But in many other cases suits against one person or party may result from the tort or breach of contract of another; and then, whether damages therefor, including the cost and expenses, may be recovered for such wrong or breach of contract will depend on whether such suits, with the consequences and incidents in question, were the natural and proximate result of the act complained of or were within the contemplation of the parties.<sup>1</sup> Where a person falsely professes to act as an agent there is an implied warranty that he is such. If he have no authority and his pretense is false, either the party whom he assumed to represent<sup>2</sup> or the party dealing with him on the faith of his being an agent<sup>3</sup> may hold him answerable for all damages resulting from his unauthorized contracts; and among other things for costs of actions brought or defended in consequence of such contracts. So a party who sells property with an express or implied warranty of title is liable for the costs of a successful action, as well as damages recovered therein against his vendee, by which such title is overthrown and the vendee dispossessed or compelled to pay for the property to another person.<sup>4</sup>

The right of a party who has bought property with a warranty of title to defend a suit brought against him based upon an adverse claim, after he has given notice to the vendor [141] and requested him to assume the defense, and his failure to reply or refusal to defend, stands upon somewhat different considerations from those which apply to sureties and others in similar situations. A vendee has a right to the property

<sup>1</sup> *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413.

<sup>2</sup> *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

<sup>3</sup> *Collen v. Wright*, 7 El. & B. 301; *Hughes v. Graeme*, 33 L. J. (Q. B.) 335.

<sup>4</sup> *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Rickert v. Snyder*, 9 Wend. 416; *Bennet v. Jenkins*, 13 Johns. 50; *Harding v. Larkin*, 41 Ill. 413; *Crisfield v. Storr*, 36 Md. 129, 11

Am. Rep. 480; *Boyd v. Whitfield*, 19 Ark. 447; *Ryerson v. Chapman*, 66 Me. 557; *Williamson v. Williamson*, 71 Me. 442; *Brewster v. Countryman*, 12 Wend. 446; *Marlatt v. Clary*, 20 Ark. 251; *Giffert v. West*, 33 Wis. 617; *Eaton v. Lyman*, 24 Wis. 438; *Stewart v. Drake*, 9 N. J. L. 139; *Holmes v. Sinnickson*, 15 id. 313, 29 Am. Dec. 637; *Morris v. Rowan*, 17 N. J. L. 304; *Coleman v. Clark*, 80 Mo. App. 339, citing the text.

which he has purchased, as between him and the vendor; and unless he is made aware that the vendor's title was defective, or that the suit of a third person for the property cannot for some reason be defended, he has a right to defend in reliance upon the warranty to the end that he may have and enjoy the fruit of his purchase. So if there is a warranty of kind or quality the purchaser has a right to act upon the assumption that such warranty is true, and sell with like warranty, and defend suits for its breach.<sup>1</sup> But if he has notice that his title is bad or that the warranty cannot be maintained he is under the same restrictions as all other parties who have a right of recovery over against unnecessary expense or an unrighteous resistance of an action which cannot be defended.<sup>2</sup> In an action on a warranty of the soundness of a horse which had been sold with like warranty, and in which the plaintiff had been beaten in a suit against him on his warranty, it was held he was not entitled to recover as special damage the cost incurred by him in the defense of the former action, for the jury found that by reasonable examination of the horse he might have discovered that it was unsound at the time he sold it.<sup>3</sup> An examiner and guarantor of titles to real estate employed to conduct the purchase of a house procured from its owner, who also owned the adjoining house, a deed which through its negligence covered the wrong house; the grantee procured the reformation of such deed and, on obtaining possession of the house he desired, found it incumbered by a mortgage not disclosed to him by the examiner. After eviction by foreclosure, the grantor being insolvent, he recovered from the examiner the money paid on the purchase price, that being less than the amount of the undisclosed mortgage.<sup>4</sup>

<sup>1</sup> *Hammond v. Bussey*, 20 Q. B. Div. 79, stated in note to § 87; *Clare v. Maynard*, 7 C. & P. 741; *Curtis v. Hannay*, 3 Esp. 82; *Sweet v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 Me. 561.

<sup>2</sup> *Short v. Kalloway*, 11 A. & E. 28; *Wrightup v. Chamberlain*, 7 Scott, 598; *Lunt v. Wrenn*, 113 Ill. 168.

<sup>3</sup> *Wrightup v. Chamberlain*, *supra*,

<sup>4</sup> *Ehmer v. Title Guarantee & Trust Co.*, 156 N. Y. 10, 50 N. E. Rep. 420.

Moneys paid by a corporation to establish the business in which it is engaged cannot be recovered by the shareholders in an action against the directors for negligence. *Bloom v. National United Benefit Savings & Loan Co.*, 152 N. Y. 114, 46 N. E. Rep. 166.

§ 85. **Same subject; bonds and undertakings; damages and costs.** Upon statutory bonds and undertakings to pay damages and costs resulting from the issue of certain writs, as an injunction, sequestration or attachment, in case it shall be decided that the party obtaining it was not entitled to it, the recovery depends mainly upon the terms of the instrument; but "damages and costs" include, among other things, the costs incident to the particular writ and of the proceedings to procure its discharge, including counsel fees, except in the federal courts.<sup>1</sup> On principle and the weight of authority, where the prosecution or defense of suits is rendered naturally and proximately necessary by a breach of contract or any wrongful act, the costs of that litigation, reasonably and judiciously conducted, paid or incurred, including reasonable counsel fees, are recoverable as part of the damages.<sup>2</sup>

<sup>1</sup> *Corcoran v. Judson*, 24 N. Y. 106; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335; *Groat v. Gillespie*, 25 Wend. 383; *Edwards v. Bodine*, 11 Paige, 223; *Rose v. Post*, 56 N. Y. 603; *Rosser v. Timberlake*, 78 Ala. 162; *Pettit v. Mercer*, 8 B. Mon. 51; *Meshke v. Van Doren*, 16 Wis. 319; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Gear v. Shaw*, 1 Pin. 608; *Barton v. Fisk*, 30 N. Y. 171; *Tamara v. Southern Illinois University*, 54 Ill. 334; *Elder v. Sabin*, 66 Ill. 126; *Wilson v. McEvoy*, 25 Cal. 170; *Cummings v. Burleson*, 78 Ill. 281; *Prader v. Grim*, 13 Cal. 585; *Guild v. Guild*, 2 Met. 229; *Brown v. Jones*, 5 Nev. 374; *Baggett v. Beard*, 43 Miss. 120; *Raupman v. Evansville*, 44 Ind. 392; *Alexander v. Colcord*, 85 Ill. 323; *Steele v. Thatcher*, 56 Ill. 257; *Miller v. Garrett*, 35 Ala. 96; *Holmes v. Weaver*, 52 id. 516; *Noble v. Arnold*, 23 Ohio St. 264; *Riddle v. Cheadle*, 25 id. 278; *McRae v. Brown*, 12 La. Ann. 181; *Campbell v. Metcalf*, 1 Mont. 373; *Derry Bank v. Heath*, 45 N. H. 524; *Langworthy v. McKelvy*, 25 Iowa, 48; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Wallace v. York*, 45 Iowa, 81; *Bonner v.*

*Copley*, 15 La. Ann. 504; *Sandback v. Thomas*, 1 Stark. 306; *Pritchett v. Boevey*, 1 Cr. & M. 775; *Holloway v. Turner*, 6 Q. B. 928. See *Day v. Woodworth*, 13 How. 363; *Oelrichs v. Spain*, 15 Wall. 211; §§ 512, 524.

Attorney fees not allowed in an action for infringement of a patent. *Teese v. Huntingdon*, 23 How. 2.

Counsel fees for services rendered in the supreme court on appeal may be recovered for. *Bolling v. Tate*, 65 Ala. 417, overruling earlier cases,

<sup>2</sup> *Hughes v. Graeme*, 33 L. J. (Q. B.) 335; *Ziegler v. Powell*, 54 Ind. 173; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Krug v. Ward*, 77 Ill. 603; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Noyes v. Ward*, 19 Conn. 250; *Pond v. Harris*, 113 Mass. 114; *White v. Madison*, 26 N. Y. 117; *Henderson v. Squire*, L. R. 4 Q. B. 170; *Webber v. Nicholas*, 4 Bing. 16; *Noble v. Arnold*, 23 Ohio St. 264; *Alexander v. Jacoby*, id. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Ryerson v. Chapman*, 66 Me. 557; *Dubois v. Hermance*, 56 N. Y. 673; *Call v. Hagar*, 69 Me. 521; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Ah Thaie v.*

§ 86. **Same subject; necessity of notice to indemnitor to fix liability.** Where a judgment recovered may, by notice to one ultimately liable, fix the amount which the latter is liable to pay to the party against whom the judgment is obtained, in some states notice is required in order to entitle the party sued to the ulterior recourse for the costs of defending; because the defense is to be made or not solely in the interest [143] of the party who must in the end be chargeable with the proper consequences of the liability upon which the judgment is founded; therefore, he is entitled to be consulted, and to have no expenses incurred and charged to him except at his request or with his sanction. Confined to cases covered by an obligation of indemnity and those where there is no right of the immediate defendant or party to the suit peculiar to himself to be asserted in the action, the rule is a wholesome one and rests upon sound principles. Of this class are actions against an agent, servant or surety for acts of which the master or principal must bear the whole responsibility; suits against which there is an express indemnity and those in which the party proceeded against is sought to be made liable without actual misfeasance for the acts of another who must respond for the consequences of that liability.<sup>1</sup> The object of the notice is not to give a ground of action. If a demand be sued which the person indemnifying is bound to pay, and notice be given to him and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, the other party is estopped after such notice from disputing it or from claiming that the party sued was not bound to pay it.<sup>2</sup> Its effect is to let in the party who

Quan Wan, 3 Cal. 216; Henay v. Hand, 36 Ore. 492; 59 Pac. Rep. 330, citing the text. See Barnard v. Poor, 21 Pick. 378; Rice v. Austin, 17 Mass. 197; Guild v. Guild, 2 Met. 229; Arcambel v. Wiseman, 3 Dall. 306; Gould v. Barratt, 2 Mood. & Rob. 171; Malden v. Fyson, 11 Q. B. 292; In re United Service Co., L. R. 6 Ch. 212; Tindall v. Bell, 11 M. & W. 228; Dixon v. Fawcas, 3 E. & E. 537; Hammond v. Bussey, 20 Q. B. Div. 79; Murrell v. Fysh, 1 Cab. & E. 80; § 58.

<sup>1</sup> Lowell v. Boston, etc. R. Co., 23 Pick. 24; Proprietors of L. & C. v. Lowell H. R. Co., 109 Mass. 221; Otumwa v. Parks, 43 Iowa, 119; Apgar v. Hiler, 24 N. J. L. 812; Beckley v. Munson, 22 Conn. 299; Holmes v. Weed, 24 Barb. 546; Fisher v. Fallows, 5 Esp. 171; Brooklyn v. Brooklyn City R. Co., 57 Barb. 497; Finckh v. Evers, 25 Ohio St. 82.

<sup>2</sup> Duffield v. Scott, 3 T. R. 374.

is bound to indemnify to defend the suit against the indemnified party and to preclude the former from showing, when sued for such indemnity, that the plaintiff has no claim for the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given to him.<sup>1</sup> It is not necessary to the production of this result that the indemnitor should have notice in writing, or even express notice, of the action; notice may be implied from his knowledge of the action and participation in its defense.<sup>2</sup> A formal request that he assume the defense of the action is not essential.<sup>3</sup>

In such actions two questions arise: first, has the plaintiff a legal cause of action; second, to what extent has he been damaged? The indemnifying party is entitled to his day in court on these questions. If he has notice to defend a suit brought against another who has a right of recovery over against him, that opportunity is offered him; and the right to defend [144] at his expense will depend on his answer, and he cannot be charged with costs of an improvident defense or one made contrary to his expressed will.<sup>4</sup> If notice cannot be given it is reasonable that the indemnified party should exercise some judgment whether to defend or not, where the amount is unliquidated or the demand disputable. Where he does so without notice and judgment is recovered against him it is *res inter alios acta* as to the first of these questions, and *prima facie* evidence on the second, though the contract of indemnity is general.

§ 87. **Same subject.** There are not the same reasons for notice to the party ultimately liable, though there are reasons for notice, where the action, the costs of which are claimed, is brought on some independent contract, or is the alleged result of a tortious act of such party; and where the party claiming for the costs of defending such action defended it to maintain

<sup>1</sup> Smith v. Compton, 3 B. & Ad. Y. 614; Port Jervis v. First Nat. Bank, 96 id. 550.  
407; French v. Parish, 14 N. H. 496; Port Jervis v. First Nat. Bank, 96 N. Y. 550.

<sup>2</sup> Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372; Beers v. Pinney, 12 Wend. 309; Heiser v. Hatch, 86 N.

<sup>3</sup> Heiser v. Hatch, *supra*; Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 91 Fed. Rep. 213.

<sup>4</sup> See New York State M. Ins. Co. v. Protection Ins. Co., 1 Story, 458.

his own legal rights derived from that party, and does not make the defense in his interest, he may still have his recourse to him for indemnity. A vendee, having a warranty of title, may defend a suit brought by a third person for the property without consulting his vendor. He has a right, as between himself and the latter, to retain the property and maintain, if he can, the title warranted to him; he is not obliged to content himself with a remedy on his warranty and acquiesce in any adverse claim that may be set up unless the circumstances show that it cannot be contested; he may defend a suit brought on his own warranty made to his vendee on the faith of the warranty of his vendor. A person purchasing from another who falsely pretends to be an agent may sue the supposed principal on that contract to enforce it. In case of defeat the expenses of such litigation are the natural and proximate result of the breach of contract and, if not improvidently incurred, are recoverable on the same principle as expenses incurred in other ways after a breach in furtherance of the object of a contract, or to lessen the damages which would otherwise result from its infraction.<sup>1</sup> And such items will presently be considered as a distinct topic.<sup>2</sup>

[145] The authorities are in conflict on the necessity of notice, and no clear rule or principle can be deduced from them; but the foregoing views appear to be those supported by the best considered cases and most in harmony with the principles applied in other analogous cases. Under certain conditions a notice may make the judgment conclusive evidence against the party notified in favor of one giving the notice and having a right of recovery over against him. This is the case where notice is given to a vendor by his vendee of proceedings founded upon an adverse title which becomes paramount.<sup>3</sup> So in case of other warranties, where the warrantee has acted upon them in such manner as was within the contemplation of the parties [146] at the time of contracting, as by giving like warranty and

<sup>1</sup>See *Nashua Iron & Steel Co. v. Brush*, 33 C. C. A. 456, 91 Fed. Rep. 213; *Chase v. Bennett*, 59 N. H. 394.

<sup>2</sup>*Hughes v. Graeme*, 39 L. J. (Q. B.) 335; *Ryerson v. Chapman*, 66 Me. 561; § 88.

<sup>3</sup>*Thurston v. Spratt*, 52 Me. 202; *Boyd v. Whitfield*, 19 Ark. 447; *Marlatt v. Clary*, 20 Ark. 251; *Harding v. Larkin*, 41 Ill. 413; *Castleton v. Miner*, 8 Vt. 209; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.



has been sued upon it.<sup>1</sup> It is a part of the contract of warranty that the warrantor shall defend the title; and by the warrantee giving notice when the title is attacked two objects are attained: first, it gives the defendant the advantage of the

<sup>1</sup> *Reggio v. Braggiotti*, 7 Cush. 166; *Collen v. Wright*, 8 El. & B. 647; *Randell v. Trimen*, 18 C. B. 786; *Brown v. Haven*, 37 Vt. 439; *Moule v. Garrett*, L. R. 7 Ex. 101; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227.

In *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35, the case was that H. having contracted with the plaintiffs who were carriers for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants and requested them to defend it. They refused and told the plaintiffs to take their own course. The latter defended the action brought against them by H. without success, and then sued the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defense. The court held that the costs were not recoverable, inasmuch as they could not be regarded as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants, being separate and independent. The decision of the court of exchequer was in favor of recovery for these costs. Cleasby, B., said: "Now, in the first instance, the plaintiffs could obtain very little information to guide them either in defending the action or in settling it. They could not pay money into court, for the damage done by the

water to the pictures was difficult to ascertain without a regular inquiry by persons competent to deal with the matter. Having regard to the nature of the claim, we certainly think they could not be expected either to settle the claim before action or to pay money into court; and we think it was the necessary consequence of the defendants' neglect that the plaintiffs should be put to the expense of ascertaining in a proper way the amount of their liability to Harding, in order that they might recover over against the defendants. . . . Clearly the plaintiffs were entitled to some costs. . . . The plaintiffs are entitled to recover from the defendants all costs incurred in having the amount of their liability ascertained. . . . They are not entitled to the costs of any defense peculiar to themselves, such as that they were mere forwarding agents and not carriers." But a different view was taken in the exchequer chamber. Coleridge, C. J., said: "The defense was not, in my judgment, a reasonable defense. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up. This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said, 'True, the defense was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default upon a writ of inquiry.' But I think this contention fails also because it seems to me that the whole

better information which the warrantor is supposed to possess in relation to the title; and second, saves the necessity of trying the same title again in an action against the warrantor. The notice to the latter makes him privy to the record, and he is bound by it to the extent to which his rights have been tried and adjudged; and, in an action against him at the suit of the warrantee, in addition to the record, all that is necessary to be shown is that his title was in issue, and judgment given upon it.<sup>1</sup> The warrantor is at liberty to show any other fact not involved in that adjudication which will be beneficial to his defense, as that the defect of title arose after he sold the property, and, therefore, that he had no interest in the determination of the question tried.<sup>2</sup>

of the costs were incurred for the plaintiff's own benefit, and were not in any sense the natural or proximate result of the defendants' breach of duty." Keating, Quain and Lush, JJ., were of the same opinion, and thought the damages too remote. The case of *Mors-le-Blanch v. Wilson*, *supra*, was overruled.

The latest exposition of English law upon this question is given in *Hammond v. Bussey*, 20 Q. B. Div. (1887), 79, where *Baxendale v. London, etc. R. Co.*, *supra*, is distinguished. The question decided is thus stated by the reporter: "The defendant contracted for the sale of coal of a particular description to the plaintiffs, knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendant, who, however, repudiated all liability, insisting that

the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action." Liability for costs was denied. Held, that the defense of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable under the rule in *Hadley v. Baxendale* as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.

<sup>1</sup> *Davis v. Wilbourne*, 1 Hill (S. C.), 27, 26 Am. Dec. 154; *Miner v. Clark*, 15 Wend. 425; *Barney v. Dewey*, 13 Johns. 225, 7 Am. Dec. 372; *Pickett v. Ford*, 4 How. (Miss.) 246; *Colburn v. Pomeroy*, 44 N. H. 19; *Shelby v. Missouri Pacific R. Co.*, 77 Mo. App. 205, citing the text.

<sup>2</sup> *Thurston v. Spratt*, 52 Me. 203.

### § 88. Expenses incurred to prevent or lessen damages.

Fifth, such losses may consist of labor done and expenses [148] incurred to prevent or lessen damages which would otherwise result from the defendant's default or misconduct. The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.<sup>1</sup> This is a practical obligation under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable it is of much importance. Where it exists the labor or expense which its performance involves

<sup>1</sup> *Ohio & M. R. Co. v. McGehee*, 47 Ill. App. 348; *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, 57 N. E. Rep. 863, quoting the text; *Southern R. Co. v. Ward*, 110 Ga. 793, 36 S. E. Rep. 78; *McCarty v. Boise City Canal Co.*, 2 Idaho, 225, 10 Pac. Rep. 623; *Factors' & Traders' Ins. Co. v. Werlein*, 42 La. Ann. 1046, 8 So. Rep. 435, 11 L. R. A. 361; *Gniadck v. Northwestern Imp. & Boom Co.*, 73 Minn. 87, 75 N. W. Rep. 894; *Sweeney v. Montana Central R. Co.*, 19 Mont. 163, 47 Pac. Rep. 791; *Loomer v. Thomas*, 38 Neb. 277, 56 N. W. Rep. 973, quoting the text; *Gulf, etc. R. Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285; *Southern Kansas R. Co. v. Isaacs*, 20 Tex. Civ. App. 466, 49 S. W. Rep. 690; *Austin v. Chicago, etc. R. Co.*, 93 Wis. 496, 67 N. W. Rep. 1129; *Cullerton v. Miller*, 26 Ont. 36, 45, quoting the text; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. Rep. 1053; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Pac. Rep. 717, 26 Am. St. 101; *Fowle v. Park*, 48 Fed. Rep. 789; *Pennsylvania R. Co. v. Washburn*, 50 id. 335; *Hamilton v. McPherson*, 28 N. Y. 72, 81 Am. Dec. 330; *Rexter v. Starin*, 73 N. Y. 601; *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609; *Taylor v. Read*, 4 Paige, 572; *Dillon v. Anderson*, 43 N. Y. 231; *Dorwin v. Potter*, 5 Denio, 306; *Hochster v. De la Tour*, 2 El. & B. 678; *Loker v. Damon*, 17 Pick. 284; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Cherry v. Thompson*, L. R. 7 Q. B. 573; *Driver v. Maxwell*, 56 Ga. 11; *Roper v. Johnson*, L. R. 8 C. P. 167; *Simpson v. Keokuk*, 34 Iowa, 568; *Beymer v. McBride*, 37 Iowa, 114; *Frost v. Knight*, L. R. 7 Ex. 111; *Hecksher v. McCrea*, 24 Wend. 304; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Allender v. C.*, R. I. & P. R. Co., 37 Iowa, 264; *Dobbins v. Duquid*, 65 Ill. 464; *Chamberlain v. Morgan*, 68 Pa. 168; *New Orleans, etc. Co. v. Echols*, 54 Miss. 264; *Hathorn v. Richmond*, 48 Vt. 557; *Pinney v. Andrus*, 41 Vt. 631; *Bradley v. Denton*, 3 Wis. 557; *Gordon v. Brewster*, 7 Wis. 355; *Fitzpatrick v. Boston & M. R.*, 84 Me. 33, 24 Atl. Rep. 432; *Williams v. Yoe*, 19 Tex. Civ. App. 281, 46 S. W. Rep. 659; *Dietrich v. Hannibal, etc. R. Co.*, 89 Mo. App. 36; *Webb v. Metropolitan Street R. Co.*, id. 604; *Warren v. Stoddart*, 105 U. S. 224; *William E. Peck & Co. v. Kansas City Metal Roofing & C. Co.*, — Mo. App. —, 70 S. W. Rep. 169.

is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury or the part of it that such measures have or would have prevented.<sup>1</sup> This is on the principle that if the efforts made are successful the defendant will have the benefit of them; if they prove abortive it is but just that the expense attending them shall be borne by him.<sup>2</sup>

<sup>1</sup> *Id.*; *Monroe v. Lattin*, 25 Kan. 351; *Board of Com'rs v. Arnett*, 116 Ind. 488, 19 N. E. Rep. 299; *Texas & P. R. Co. v. Levi*, 59 Tex. 674; *Long v. Clapp*, 15 Neb. 417, 19 N. W. Rep. 467, quoting the text; *Travis v. Pierson*, 43 Ill. App. 579; *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. Rep. 129; *Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89, 39 Atl. Rep. 1019; *Hughes v. Austin*, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607, citing the text; *Nadling v. Denison & P. R. Co.*, 22 Tex. Civ. App. 173, 54 S. W. Rep. 412, quoting the text; *Nelson v. St. Louis, etc. R. Co.*, 49 Kan. 165, 30 Pac. Rep. 178; *Uhlig v. Barnum*, 43 Neb. 584, 594, 61 N. W. Rep. 749, quoting the text; *Galbreath v. Carnes*, 91 Mo. App. 512, quoting the text; *Armistead v. Shreveport, etc. R. Co.*, — La. —, 32 So. Rep. 456, citing the text.

"Legal expenses are recoverable as damages when incurred in proceedings taken by the injured party to prevent or reduce the damage which he would incur by the continuance of the wrong which he has abated by resort to such proceedings." *Clason v. Nassau Ferry Co.*, 20 N. Y. Misc. 315, 45 N. Y. Supp. 675, citing this section.

In an action to punish defendants for contempt in violating an injunction the expense of a second injunction was included in the fine im-

posed on them, it being considered that such expense was incurred in an action brought expressly to restrain a continuance of the damage. *Jewelers' Mercantile Agency v. Rothschild*, 6 App. Div. 499, 39 N. Y. Supp. 700.

A corporation which wrongfully refuses to register shares in the name of a purchaser must respond to him for the value of other shares he bought to lessen the responsibility he was under to his vendee. *Balkis Consolidated Co. v. Tomkinson*, [1893] App. Cas. 396; *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614.

<sup>2</sup> *Watson v. Proprietors Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49; *Summers v. Tarney*, 123 Ind. 560, 24 N. E. Rep. 678. See § 693.

In *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341, is a sound exposition of this duty. *Weston, J.*, said: "If the party injured has it in his power to take measures by which his loss may be less aggravated this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish and throw

When, after a contract has been entered into, notice is [149] given by one of the parties that it is rescinded on his part, he is only liable for such damages and loss as the other has suffered by reason of such rescinding; and it is the duty [150] of the latter, upon receiving such notice, to save the former, as far as it is in his power, all further damages though to do so may call for affirmative action.<sup>1</sup> If a person hired for service for a given term is wrongfully dismissed he is entitled to the stipulated wages for the term of his engagement if that is his loss. It is *prima facie* his loss; but the law imposes on him

the whole loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less he may recover the difference, with commissions, and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere possit, iubet.* And he who has it in his power to prevent an injury to his neighbor and does not exercise it is often in a moral, if not in a legal, point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by common prudence have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality and for the stipulated price can be at once purchased on the spot

it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases; and for any unavoidable loss occasioned by the failure of the other he is justly entitled to a liberal and complete indemnity."

In *Hogle v. New York, etc. R. Co.*, 28 Hun, 363, the trial court refused to charge that when plaintiff discovered a fire on his premises he could not recover for subsequent damages if he neglected to use reasonable practicable means to suppress it, on the ground that the fire was not attributable to his fault. This was considered as not being far from saying that he might do what he could to increase it. He was bound to use all reasonable efforts in his power to stop the fire. *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Milton v. Hudson River S. Co.*, 37 N. Y. 214. See *O'Neill v. New York, etc. R. Co.*, 45 Hun, 458, as to an excuse for non-performance of duty.

<sup>1</sup>*Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. Rep. 129, quoting the text; *Dillon v. Anderson*, 43 N. Y. 231.

the duty to seek other employment; and to the extent that he obtains it and earns wages, or might have done so, his damages will be reduced.<sup>1</sup> The rule as stated was deemed applicable where the owner of water lots upon a lake front, subject to the reservation of free passage thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless he paid toll, which he refused to do; the defendant having acted without malice and under a *bona fide* mistake as to his rights, the plaintiff ought to have paid the toll under protest, and because he did not, he could not recover for the loss of his business consequent on the failure to ship ice.<sup>2</sup> In an action for damages resulting from alleged defects in the construction of a building so that the roof leaked and injured the interior work or property therein,<sup>3</sup> or for breach of a contract to repair a building from which similar injuries ensued,<sup>4</sup> or for injury to crops through default of the defendant in not building or repairing a fence, or his tortious opening of the same,<sup>5</sup> where the party suffering from the injury is aware of the fact and the cause and that by a little timely labor and expense the damage could be avoided, the law imposes the duty on him to stay the injury, when he is in a favorable situation to do it, and enforces the duty by confining his redress for the injury thus avoidable to compensation for the necessary and proper means of prevention.<sup>6</sup> The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases, to do or amend the work of the other party, or to finish it; but

<sup>1</sup> Borden Mining Co. v. Barry, 17 Md. 419; Sutherland v. Wyer, 67 Me. 64; Gillis v. Space, 63 Barb. 177; Heavilon v. Kramer, 31 Ind. 241; Heilbronner v. Hancock, 33 Tex. 714; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Williams v. Chicago Coal Co., 60 Ill. 149; Raleigh v. Clark, 71 S. W. Rep. 857, — Ky. —, quoting the text.

<sup>2</sup> Cullerton v. Miller, 26 Ont. 36. <sup>3</sup> Cook v. Soule, 56 N. Y. 420; Thompson v. Shattuck, 2 Met. 615.

<sup>4</sup> Andrews v. Jones, 36 Tex. 149; Campbell v. Miltenberger, 26 La. Ann. 72; Loker v. Damon, 17 Pick. 284; Fisher v. Goebel, 40 Mo. 475; Waters v. Brown, 44 Mo. 302; St. Louis, etc. R. Co. v. Ritz, 33 Kan. 404; Same v. Sharp, 27 id. 134; Smith v. C., C. & D. R. Co., 38 Iowa, 518.

<sup>5</sup> Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Am. St. 101, 26 Pac. Rep. 717.

<sup>6</sup> Dorwin v. Potter, 5 Denio, 306;

only when in view of all the circumstances of the particular case it is a reasonable duty which he ought to perform instead of passively allowing a greater damage.<sup>1</sup> Where the party whose duty it is primarily to do the work necessary to fulfill the contract and to prevent damage from past failure or to stay injuries resulting from his negligence or other wrong is [151] in possession or has equal knowledge and opportunity, he alone may be looked to to fulfill that duty, and it will not avail him to say the injured party might have lessened the damages by performing the duty for him.<sup>2</sup>

§ 89. **Same subject; between vendor and vendee.** If the party claiming damages is a purchaser he can recover no more than it would cost him, with reasonable diligence, to supply himself with the same property by resort to the market<sup>3</sup> or other source or means of supply.<sup>4</sup> So where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he cannot recover damages for them as consequences of the breach of warranty.<sup>5</sup> A. sold to B. a quantity of pork in barrels with a warranty that the barrels would not leak; B. stored it in a suitable place, but found afterwards that some of the barrels were leaking. In order to preserve the pork he filled

<sup>1</sup> *Armistead v. Shreveport, etc. R. Co.*, — La. —, 32 So. Rep. 456, 459, quoting the text; *Raleigh v. Clark*, — Ky. —, 71 S. W. Rep. 857, quoting the text.

<sup>2</sup> *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 id. 561; *Schwinger v. Raymond*, 83 id. 192, 38 Am. Rep. 415; *Keys v. Western Vermont Slate Co.*, 34 Vt. 81; *Haysler v. Owen*, 61 Mo. 270; *Fisher v. Goebel*, 40 Mo. 475; *Green v. Mann*, 11 Ill. 613; *Waters v. Brown*, 44 Mo. 302; *Smith v. Chicago, etc. R. Co.*, 38 Iowa, 518; *Chicago, etc. R. Co. v. Ward*, 16 Ill. 522; *Flynn v. Trask*, 11 Allen, 550; *Priest v. Nichols*, 116 Mass. 401; *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *St. Louis, etc. R. Co. v.*

*Mackie*, 71 Tex. 491, 10 Am. St. 766, 9 S. W. Rep. 451, 1 L. R. A. 667.

<sup>3</sup> *Parsons v. Sutton*, 66 N. Y. 92; *McHose v. Fulmer*, 73 Pa. 365; *Gainsford v. Carroll*, 2 B. & C. 624; *Barrow v. Arnaud*, 8 Q. B. 604; *Hassard-Short v. Hardison*, 114 N. C. 482, 19 S. E. Rep. 728; *Creve Couer Lake Ice Co. v. Tamm*, 90 Mo. App. 189; *Lawrence v. Porter*, 63 Fed. Rep. 62.

<sup>4</sup> *Benton v. Fay*, 64 Ill. 417; *Beymer v. McBride*, 37 Iowa, 114; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Hinde v. Liddell*, L. R. 10 Q. B. 265.

<sup>5</sup> *Draper v. Sweet*, 66 Barb. 145; *Maynard v. Maynard*, 49 Vt. 297; *Frick Co. v. Falk*, 50 Kan. 644, 32 Pac. Rep. 360.

the leaking barrels from time to time with new brine; but they continued to leak and a considerable quantity of the pork was spoiled. B. did not give notice to A. of the condition of the barrels, nor offer to return the pork. It was the established practice among persons dealing in pork, of which B. was presumed to be cognizant, where the leaking of the barrels continued after they had been filled with new brine, to take out the pork and repack it in new barrels. In a suit brought by A. for the price of the pork, B. claimed a deduction of the damages for breach of the warranty; it was held that the only deduction he was entitled to was the sum which [152] he would have been compelled to pay for new barrels in the place of the leaky ones, and for the repacking of the pork in them. If B., without knowledge that the barrels were leaky, and without care in informing himself of their condition, had suffered the pork to remain in them for a reasonable time, and it had thereby become spoiled, he could have recovered in an action on the warranty the value of the pork spoiled. But as he knew that the barrels were leaky and might have prevented the injury to the pork by procuring new ones and repacking it, the loss of the pork should be regarded as attributable to his own want of care rather than to the defect of the barrels.<sup>1</sup>

**§ 90. Same subject; extent of the duty.** The principle that the injured party must reasonably exert himself to prevent damage applies alike to cases of contract and tort.<sup>2</sup> He is not required to commit a tort to prevent damages;<sup>3</sup> nor to anticipate and provide against a threatened trespass.<sup>4</sup> The plaintiff had a lease of a grazing farm, which he had occasion to use to its capacity in grazing his cattle intended for sale; the defendant wrongfully turned other cattle of his own upon the farm and persisted, against the plaintiff's remonstrance, in keeping them there; in consequence the plaintiff suffered seri-

<sup>1</sup> *Hitchcock v. Hunt*, 28 Conn. 343. *Meigs*, 50 N. Y. 480. See *Wing Chung*

<sup>2</sup> *Factors' & Traders' Ins. Co. v. v. Los Angeles*, 47 Cal. 531.

*Werlein*, 42 La. Ann. 1046, 1053, 8 So. <sup>4</sup> *Plummer v. Penobscot Lumbering Ass'n*, 67 Me. 363; *Reynolds v. Chandler River Co.*, 43 Me. 513. See

<sup>3</sup> *Wolf v. St. Louis Independent Driver v. Western Union R. Co.*, 32 Water Co., 15 Cal. 319; *Hubbell v. Wis.* 569, 14 Am. Rep. 726.



ous loss to his stock for want of sufficient pasturage. It was held not to be the duty of the plaintiff under such circumstances to provide other pasturage for his cattle to lessen damages in exoneration of the defendant.<sup>1</sup> The measure of

<sup>1</sup> Gilbert v. Kennedy, 22 Mich. 117. Compare Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607.

In the Michigan case the duty in question is recognized, but Christianity, J., said: "Whether it is applicable at all to the facts of the present case is only important, so far as it bears on the duty of the plaintiff, when the defendant's cattle were wrongfully turned in, to remove his own cattle from the pasture before they should be injuriously affected by the overfeeding of the defendant's cattle; or to prevent at any particular time further injury from this cause. . . . The rule in question (if based upon the supposed duty) is simply one of good faith and fair dealing. If a man tortiously injures the roof of my dwelling, and I obstinately leave it in that condition, and, having the opportunity, refuse or neglect to repair until the furniture and the bedding in the house are injured or destroyed by the rains, I cannot recover of him for this injury to my furniture and bedding, which I might have avoided by timely repairs. And if a man come to my field, where my cattle are grazing, turn them out into the street, and turn his own cattle in, thus ousting me from the possession, and claiming and holding exclusive possession against me, I cannot leave my cattle in the street to starve, and then charge him with their full value, if it be practicable by reasonable effort on my part to procure other pasture or feed for them; but I can recover only such damages as I have suffered beyond what I might have avoided by reasonable diligence. But, if he come to the same field, and wrong-

fully turn his cattle in *with* mine, neither taking nor claiming any exclusive possession, and, as often as I turn his cattle out, he persists in turning them in again till I find it impracticable to keep them out without coming to blows, and cease to attempt it, and my cattle from this cause are deprived of necessary feed, and I resort to a suit as my only remedy, which is substantially the present case, at *what particular point* in this series of tortious conduct does good faith to him require me to turn my own cattle from my own field and find pasture for them elsewhere to save him from liability for their further injury from his repeated or continuous wrongs? Have I not a better right to insist that he shall, and to presume that he will, relent, and cease the continuance of his tortious acts than he has to claim that I shall remove my cattle from my own field and leave it to him? Is it not rather his duty to cease the continuance of his wrongs than mine to give up my acknowledged right? The damages, in such a case, are in no proper sense increased by any act or negligence of mine, but by the continuance of his own tortious conduct. As to the question of duty, as well might it be said if he had repeatedly assaulted and beaten me and my family in my own house, and declared his intention of repeating the process as long as we should remain there, it would be my duty to remove myself and family from the house to avoid increasing the damages which might otherwise accrue from his further continuance or repetition of the like conduct.

the duty is such care and diligence as a man of ordinary prudence would use under the circumstances. One may not have done the very thing nor used the very means that should have been used, as developed by subsequent information, and yet not be in fault. One is not bound to inquire as to the means of getting what his vendor has deprived him of unless he knew such facts as would put a prudent man upon inquiry.<sup>1</sup> A lessee is not bound to go to an expenditure of \$300 in constructing a ditch to protect his property from injury resulting from negligence in the construction of a railroad.<sup>2</sup> The efforts made to reduce the effects of the wrong must be confined to such as are reasonable and made in good faith.<sup>3</sup> The expense resulting from them can be recovered only to the extent that it is within the loss which would otherwise have been sustained.<sup>4</sup>

"There was no duty resting upon the plaintiff at any time to remove his cattle and procure pasturage for them elsewhere if this could have been done. In perfect good faith, the plaintiff had a right to keep his cattle there, and to hold the defendant liable for the continuous injury arising from his continuous wrong. But if the plaintiff chose to take any of his cattle out to prevent further injury, it would then, as to such cattle, become his duty to make a reasonable effort to procure other food or pasturage for them, in the most prudent way he reasonably could." See *Lawson v. Price*, 45 Md. 123.

<sup>1</sup> *Waco Artesian Water Co. v. Cauble*, 19 Tex. Civ. App. 417, 47 S. W. Rep. 538.

<sup>2</sup> *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011.

<sup>3</sup> *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. Rep. 917; *Ellis v. Hilton*, 73 Mich. 150, 43 N. W. Rep. 1048, 18 Am. St. 438, 6 L. R. A. 454; *Mt. Sterling v. Crummy*, 73 Ill. App. 572.

Expenses incurred by a party to a contract in apprehension of damage, if based upon mere rumors, are not recoverable. *Holt v. Silver*, 169 Mass. 435, 456, 48 N. E. Rep. 837.

<sup>4</sup> *Murphy v. McGraw*, *Ellis v. Hilton*, *supra*; *Keyes v. Minneapolis*, etc. R. Co., 36 Minn. 290, 30 N. W. Rep. 888; *St. Louis, etc. R. Co. v. Ritz*, 33 Kan. 404. *Contra*, *Gulf, etc. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. Rep. 1117.

In an action against a railroad company which had failed to construct cattle-guards, as required by statute, the plaintiff was entitled to recover for services in herding his cattle up to, but only up to, the value of the things belonging to himself and others which might have been injured by the cattle if they had been permitted to run at large, and which things the plaintiff had the right to protect, or which he was under obligation to protect from the depredations of his cattle. In answer to the contention that the defendant was liable for the value of the herding only up to the amount of the damages which the cattle would have committed if they had been permitted to run at large, it was said that it would be in a degree correct if it could be ascertained with any degree of certainty just the amount of the damage which would have resulted in that event. But it was not shown how much or how little damage, or how much or how little injury

If the courts can protect the rights of the injured party he must resort to them instead of using his individual efforts to counteract the wrong being done.<sup>1</sup>

A surety is not bound to pay his principal's debt as a [153] duty to prevent the costs incident to a suit for its collection.<sup>2</sup> Any loss or expense occasioned by an attempt to avoid payment of an obligation cannot be contemplated by the parties as a subject of indemnity, the true meaning of the contract being that if the surety pays voluntarily he shall be re- [154] imbursed; if he is compelled by suit to pay he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon the surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity because they might be avoided by payment, which he must be considered as stipulating he could make.<sup>3</sup>

If work is improperly done or is not done within the agreed time, but is of use to and appropriated by the employer, the *quantum meruit* claim for it is reducible by allowance of the damages for failure to perform the contract in manner and time; but in such a case if the employer can protect himself from damage by reason of the defective or dilatory work at a moderate expense, or by ordinary and reasonable efforts, he is bound to do so, and he can charge the delinquent party

the cattle might have done if they had been permitted to run at large. Besides, if the plaintiff is to recover for the herding only up to the amount of the damages which the cattle might have done if they had been permitted to run at large, then how is the plaintiff to obtain compensation for the loss of his pasture and the possible loss of his cattle and the possible shrinkage in their value because of a possible loss of proper food, and how is he to obtain compensation for his time and trouble and expense in hunting for and recovering his cattle? Chicago, etc. R. Co. v. Behney, 48 Kan. 47, 28 Pac. Rep. 980. In so far as it is intimated that a recovery might be had for possible loss, the language used is contrary to the fundamental idea governing the law of compensation.

<sup>1</sup> Fowle v. Park, 48 Fed. Rep. 789. *Contra*, Cole v. Stearns, 20 N. Y. Misc. 502, 505, 46 N. Y. Supp. 238.

<sup>2</sup> McKee v. Campbell, 27 Mich. 497; Holmes v. Weed, 24 Barb. 546.

<sup>3</sup> Hayden v. Cabot, 17 Mass. 169.

therefor, and with the damages which could not be thus avoided.<sup>1</sup>

In case of wrongful injury to person or property the injured party is required to use reasonable exertion to lessen or moderate the resulting damage.<sup>2</sup> Land adjacent to a railroad was flooded by water turned on to it by the construction of the road; it got into the cellar of the house thereon and injured the walls. It was held that the owner was bound to use reasonable care, skill and diligence adapted to the occasion to prevent this consequence, notwithstanding the wrongful agency of the railroad company in turning the water upon the premises.<sup>3</sup> Recovery cannot be had against a notary for negligent omission to give notice of protest to an indorser where the holder could, but would not, resort to other grounds for charging the latter.<sup>4</sup> Persons whose goods are destroyed by a riot-[155]ous mob in a city are not entitled to recover from the city the value of the goods destroyed unless such persons, if they had knowledge of the impending peril, use reasonable diligence to notify the mayor or sheriff of the threatened riot and the apprehended danger to their property.<sup>5</sup> The owner of land on which a personalty tax has been irregularly charged by a tax collector will be denied any remedy against him therefor if it is in the power of the former with very little trouble and expense to appear before the board or tribunal having authority in the premises and procure a correction.<sup>6</sup> A party interested in a decree for a fund invested can claim no indemnity for depreciation of the fund during his delay to enforce the decree, it being his duty to apply seasonably to the court for its enforcement.<sup>7</sup> A claimant of damages is bound to accept reasonable offers of the other party or a third person

<sup>1</sup> Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387; Mather v. Butler County, 28 Iowa, 259.

<sup>2</sup> French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Allender v. C., R. I. & P. R. Co., 37 Iowa, 264; The Baltimore, 8 Wall. 377; Little v. McGuire, 43 Iowa, 447; Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. Rep. 1053; Webb v. Metropolitan Street R. Co., 89 Mo. App. 604. See ch. 36.

<sup>3</sup> Chase v. New York Central R. Co., 24 Barb. 273; Louisville & N. R. Co. v. Goodin, 14 Ky. L. Rep. 622; Same v. Finley, 7 id. 129.

<sup>4</sup> Franklin v. Smith, 21 Wend. 624.

<sup>5</sup> Wing Chung v. Los Angeles, 47 Cal. 531.

<sup>6</sup> State v. Powell, 44 Mo. 436; Wright v. Keith, 24 Me. 158.

<sup>7</sup> Carson's Ex'r v. Jennings, 1 Wash. C. C. 129.

having direct reference to the subject of the loss which would have the effect of reducing or preventing damage.<sup>1</sup> Where damages can be thus saved by timely preventive measures by the injured party it is his *duty* to exert himself for that purpose; but he has a correlative *right* in similar cases to employ other means to attain the object of the contract broken which was within the contemplation of the parties at the time of contracting, or to extricate himself from any predicament in which the wrong complained of may have placed him.<sup>2</sup>

In an action to recover for personal injuries the defendant insisted that the plaintiff should submit to a surgical operation, the testimony as to the certainty of a cure in that event being that it would probably be effected. The court said: While the person who inflicts the damage has the right to say that sure and safe means to diminish the evil results of the accident must be used, that is the extent of his right. Whether further means should be resorted to is for the plaintiff to determine. In making that determination the plaintiff has the right to consider the nature of the means used to effect a cure, and the possible or probable effect upon himself. In any given case it may be that the treatment which is given to the plaintiff is not the best that could be devised, but he is not the less entitled to his damages on that account if, in taking that treatment, he has consulted such a physician as a reasonably prudent man would consult. Having done that, he is entitled to his damages. If he did not, and the jury can say that some other treatment would have brought about a cure, and that treatment was one that a reasonably prudent man would have submitted to, then they must say that he has not used the care which he ought to have used, and must take that into consideration in reaching their verdict.<sup>3</sup> An injured person is not affected by the mistake of the physician chosen by

<sup>1</sup> Dobbins v. Duquid, 65 Ill. 464; Parsons v. Sutton, 66 N. Y. 92; Beymer v. McBride, 37 Iowa, 114; Bisher v. Richards, 9 Ohio St. 495; Ashley v. Rocky Mountain Bell Telephone Co., 25 Mont. 286, 296, 64 Pac. Rep. 765, quoting the text; Lawrence v. Porter, 63 Fed. Rep. 62, 11 C. C. A. 27, 26 L. R. A. 167.

<sup>2</sup> Hoffman v. Union Ferry, 68 N. Y. 385; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; James v. Hodsden, 47 Vt. 127.

<sup>3</sup> Blate v. Third Avenue R. Co., 44 App. Div. 163, 60 N. Y. Supp. 232.

him in the exercise of ordinary care;<sup>1</sup> and the question of good faith in rejecting the advice of a physician is for the jury.<sup>2</sup> Inability to secure the best medical attendance will not bar a recovery.<sup>3</sup>

**§ 91. Same subject; employer may finish work at contractor's expense.** On the failure of a contractor to finish his contract the employer may cause it to be done by others, and the reasonable sum required to be paid therefor may be recovered of the delinquent party.<sup>4</sup> One who has contracted [156] for the shipment of goods, or to be carried as a passenger, may employ other reasonable means of transportation if the carrier fails to fulfill his contract, and recover the excess of cost as well as other damages.<sup>5</sup> The question whether the expense of the substituted mode of conveyance, as, indeed, whether any expense for a substituted performance or to counteract the injurious effect of the act complained of may be recovered, will depend on whether the act done for which such expense was incurred was a reasonable thing to do, considering all the circumstances. A party to a contract which has been broken by the other has a right to fulfill it for himself, as nearly as may be, but he must not do this unreasonably as regards the other party, nor extravagantly;<sup>6</sup> but he may ex-

<sup>1</sup> *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Sauter v. New York, etc. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Caven v. Troy*, 15 App. Div. 163, 44 N. Y. Supp. 244.

<sup>2</sup> *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 8 Am. St. 793, 20 N. E. Rep. 569; *Hope v. Troy & L. R. Co.*, 40 Hun, 438.

<sup>3</sup> *Alberti v. New York, etc. R. Co.*, 118 N. Y. 77, 23 N. E. Rep. 35, 6 L. R. A. 765.

<sup>4</sup> *Clark v. Russell*, 110 Mass. 133; *Smeed v. Foord*, 1 E. & E. 602; *Paine v. Sherwood*, 21 Minn. 225; *Hinde v. Liddel*, L. R. 10 Q. B. 265.

In *Wigsell v. School for the Indigent Blind*, 8 Q. B. Div. 357, the grantee of land covenanted with his grantor that the land should be and be kept inclosed with a brick wall. In an action to recover damages for the breach of this covenant it was shown that the value of the adjoin-

ing lands of the plaintiff was not diminished by the non-observance of the covenant to anything like the sum which it would have cost to build the wall. The measure of damages was held to be the difference between the plaintiff's position with and without the wall, and the cost of building it was not the correct standard to be applied.

<sup>5</sup> *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Denton v. Same*, 5 El. & B. 860; *Cranston v. Marshall*, 5 Ex. 395; *Ogden v. Marshall*, 8 N. Y. 349; *Collins v. Baumgardner*, 52 Pa. 461; *Le Blanche v. London, etc. R. Co.*, 1 C. P. Div. 286; *Ward's Central & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

<sup>6</sup> *Le Blanche v. London, etc. R. Co.*, 1 C. P. Div. 286.

pend such sum as will give him what he was entitled to under his contract though that be more than the price for which the contractor was to have done the work.<sup>1</sup> On breach of a contract to carry by vessel an ordinary article of merchandise, the shipper will not be justified in procuring shipment by rail if the railroad prices would render it unprofitable. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account.<sup>2</sup>

§ 92. **May damages for breach of contract include other than pecuniary elements?** In actions upon contract the losses sustained do not, by reason of the nature of the transactions which they involve, ordinarily embrace any other than pecuniary elements. There is, however, no reason why other natural and direct injuries may not justify and require compensation. Contracts are not often made for a purpose the defeat or impairment of which can, in a legal sense, inflict a direct and natural injury to the feelings of the wronged party. A breach of promise of marriage is an instance of such a contract, in which such considerations enter into the estimate of the damages.<sup>3</sup> The action for such a cause is often referred to as an exceptional one. In a certain sense it is so; but only in [157] the particular under consideration. It is an action upon contract; the damages allowed are such as will adequately compensate the person injured, the nature and benefits of the thing promised being considered. Being of a personal nature the damages cannot be wholly measured by a pecuniary standard; the cause of action, for the same reason, dies with the person, as all demands for personal injuries do. The damages are recoverable by the injured party because they proceed directly and naturally from the breach. Other actions upon contract may embrace like damages.<sup>4</sup> Blackburn, J.,<sup>5</sup> said: "Where

<sup>1</sup> Spink v. Mueller, 77 Mo. App. 85, citing the text; Wright v. Sanderson, 20 Mo. App. 524; Haysler v. Owen, 61 Mo. 276; Hirt v. Hahn, 61 Mo. 496; 2 Sedgwick on Dam., sec. 617.

<sup>2</sup> Ward's Central & P. Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544.

<sup>3</sup> Wells v. Padgett, 8 Barb. 323; Tobin v. Shaw, 45 Me. 381, 71 Am.

Dec. 547; Wilbur v. Johnson, 58 Mo. 600; Wadsworth v. Western U. Tel. Co., 86 Tenn. 695, 6 Am. St. 864, 8 S. W. Rep. 574, quoting the text.

<sup>4</sup> Hale v. Bonner, 82 Tex. 33, 27 Am. St. 850, 17 S. W. Rep. 605, 14 L. R. A. 336; Western U. Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. Rep. 385. See ch. 22.

<sup>5</sup> In Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111.

there is a contract to supply a thing, and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for it, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. It was urged that though, when the plaintiff was . . . (left by a carrier short of his destination), . . . if he had been able to hire a fly or obtain a carriage, and paid money for it, it was admitted he could recover that money,—yet inasmuch as he could get no carriage, and was compelled to walk under penalty of staying where he was all night, he was not entitled to get anything. . . . Now, as I have said, what the passenger is entitled to recover is the difference between what he ought to have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that . . . the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage.” While it is true that if the breach causes no actual injury beyond vexation and annoyance, as all breaches of contract do more or less, they are not subjects of compensation unless to the extent that the contract was made specially to procure exemption from them, nevertheless to the extent that a contract is made to secure relief from a particular inconvenience or annoyance or to confer a special enjoyment, [158] the breach, so far as it disappoints in respect of that purpose, may give a right to damages appropriate to the objects of the contract. Inconvenience, in the case quoted from, was a prominent element of damage; that consisted in a disagreeable walk of three miles when the contract entitled the injured party to be carried in a railway car a greater portion of the distance. It was a rainy night, and he had with him his wife and small children. Sickness ensued to some of them from taking cold; damages for this were excluded by perhaps too rigid an application of the rule that they must be the natural and proximate consequence of the breach;<sup>1</sup> but a verdict allow-

<sup>1</sup> See §§ 48, 49.



ing 10% damages for the *inconvenience* was sustained.<sup>1</sup> In an action for breach of a contract to convey the plaintiff on a steamship from London to Sheerness, where the breach consisted in putting the plaintiff off, without just cause and with circumstances of aggravation, short of his destination, it was held proper to show these circumstances, and Parke, B., thus remarked upon their admissibility: "Suppose, instead of a man landed at Gravesend from a steamboat, this had been the case of a passenger in a ship bound to the West Indies, and he were put ashore on a desert island, without food, and exposed to the burning sun and danger of wild beasts, or even landed among savages, would not evidence be receivable to show the state of the island where he was left and the circumstances attending the violation of the contract?"<sup>2</sup>

The views expressed in the opening part of this section have found acceptance in a well-considered case sustaining the right to recover damages for mental suffering resulting from delay in delivering a telegram announcing the time of holding the funeral of the plaintiff's mother, and determining that there might be a recovery either *ex contractu* or *ex delicto*: We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case.<sup>3</sup> In another and similar case the text is quoted, and it

<sup>1</sup> See *Ward v. Smith*, 11 Price, 19; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. 864, 8 S. W. Rep. 574, quoting the text.

If a contract is broken in a way and by such acts as constitute an offense against the law, the jury may

consider the outrage to the feelings of the plaintiff, although the acts done were not directed against him in person, but against his son and employees. *Enders v. Skannal*, 35 La. Ann. 1000.

<sup>2</sup> *Coppin v. Braithwaite*, 8 Jur. 875. See *Rose v. Beattie*, 2 N. & McC. 538.

<sup>3</sup> *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752, 762, 62 N. W. Rep. 1, 57

is said that it serves the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards, and that where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for breach of contract) is subject to the same general rule, and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance.<sup>1</sup>

§ 93. **Elements of damage for personal torts.** In actions for torts and personal injuries damages to relative rights are frequently in question; then every particular and phase of the injury may enter into the consideration of the jury in estimating compensation,<sup>2</sup> loss of time, with reference to the injured party's condition and ability to earn money in his business or calling;<sup>3</sup> his loss from permanent impairment of faculties, mental and physical pain and suffering, disfigurement and expenses.<sup>4</sup> Where injury to a young girl results in her permanent disfigurement the jury may consider what the

Am. St. 294, 28 L. R. A. 72, citing *Holloway v. Griffith*, 32 Iowa, 409; *Royal v. Smith*, 40 Iowa, 615, and saying that the distinction pointed out is well stated in the text.

<sup>1</sup> *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, 6 Am. St. 864. See §§ 77, 915.

<sup>2</sup> *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. Rep. 751, quoting the text.

<sup>3</sup> *Welch v. Ware*, 32 Mich. 77; *Whalen v. St. Louis R. Co.*, 60 Mo. 323; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229; *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521; *Walker v. Erie R. Co.*, 63 Barb. 260; *McKinley v. Chicago, etc. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Pittsburg, etc. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Toledo, etc. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71;

*Southern R. Co. v. Myers*, 32 C. C. A. 19, 87 Fed. Rep. 149. See ch. 36.

<sup>4</sup> *Id.*; *Memphis & C. R. Co. v. Whitefield*, 44 Miss. 466; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Muldowney v. Illinois, etc. R. Co.*, 36 Iowa, 462; *Mason v. Ellsworth*, 32 Me. 271; *Morse v. Auburn, etc. R. Co.*, 10 Barb. 621; *Lucas v. Flinn*, 35 Iowa, 9; *Stewart v. Ripon*, 38 Wis. 584; *West v. Forrest*, 22 Mo. 344; *Filer v. New York Central R. Co.*, 49 N. Y. 42; *Donnell v. Sandford*, 11 La. Ann. 645; *Lynch v. Knight*, 9 H. of L. Cas. 577; *Steiner v. Moran*, 2 Mo. App. 47; *Ashcraft v. Chapman*, 38 Conn. 230; *Seger v. Barkhamsted*, 22 Conn. 290; *Pennsylvania & O. C. Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549; *Smith v. Overby*, 30 Ga. 241; *Smith v. Holcomb*, 99 Mass. 552; *Ford v. Jones*, 62 Barb. 484; *Hamilton v. Third Avenue*

effect will probably be on the prospects of her marriage when she reaches the age of womanhood, and how far the money value of her life may be damaged by that circumstance. Such an element of damages is not speculative because it is difficult to estimate, nor in any other sense than almost every element of damages is speculative where the ascertainment depends on what the jury or other trier of the fact shall deem fair and just, and where, being uncertain and indefinite, the damages are not capable of adjustment with precision and accuracy. In such a case there may be a recovery on account of that loss without a special allegation of damage, the loss being a general prospect and not a particular one.<sup>1</sup>

§ 94. **Character as affecting damages for personal injuries.** In an action to recover for personal injuries sustained while traveling as a passenger on a railroad the question arose as to the effect of the plaintiff's character for chastity upon the measure of damages. The trial court charged that the fact that the plaintiff is an unchaste woman, or has more than one husband, has nothing to do with the damages; that she is entitled to recover the same damages for injuries received as a chaste woman, or a woman who has only one husband. The appellate court, Cole, C. J., writing the opinion, says it thinks the charge had a tendency to mislead the jury: "We do not wish to intimate that an unchaste woman who is maimed and disabled by an accident on the railroad may not suffer as much pain of body or anxiety of mind as a virtuous woman would from a like injury; but still, when it comes to a question of awarding damages, it may be that a jury would not give—perhaps ought not to give—the *same damages* for injuries to an unchaste woman that they would

R. Co., 53 N. Y. 25; Holyoke v. Grand Trunk R. Co., 48 N. H. 541; Ripon v. Bittel, 30 Wis. 614; Moore v. Central R., 47 Iowa, 688; Ballou v. Farnum, 11 Allen, 73; Nones v. Northouse, 46 Vt. 587; Johnson v. Holyoke, 105 Mass. 80; Blackman v. Gardiner Bridge, 75 Me. 214; Bovee v. Danville, 53 Vt. 183; Mayor, etc. v. Lewis, 92 Ala. 352, 9 So. Rep. 243; Montgomery & E. R. Co. v. Mallette, 92 Ala.

209, 9 So. Rep. 363; Gibney v. Lewis, 68 Conn. 392, 36 Atl. Rep. 799; Louisville & N. R. Co. v. Logsdon, 71 S. W. Rep. 905 (Ky.); Newbury v. Getchell & Martin Lumber & Manuf. Co., 100 Iowa, 441, 457, 69 N. W. Rep. 743, 62 Am. St. 582, citing the text. See ch. 36.

<sup>1</sup>Smith v. Pittsburgh & W. R. Co., 90 Fed. Rep. 783.

allow a virtuous, intelligent, and industrious woman, who could command good wages or take care of a family. The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury received, in view of all the facts."<sup>1</sup> The opposing view is expressed by Judge Deady in a case<sup>2</sup> where it might have been omitted (if the Wisconsin case announces the law under any circumstances) with more propriety than in the case stated. He charged that compensatory damages for physical pain and mental anguish are not to be diminished by the fact that the plaintiff is an obscure man, that he is a bartender, a professional gambler or even a vagrant. In another case, brought by the next of kin to recover damages for the negligent killing of the deceased, Shiras and Brewer, JJ., held that proof of the good or bad reputation of the plaintiffs could not be received.<sup>3</sup> We think that a carrier cannot refuse to transport a person who presents himself as a passenger and who is properly dressed and whose conduct is not such as to enhance the risk of carrying him or endanger the comfort or safety of his fellow passengers, on the ground that he is immoral or vicious in some of the relations of life. The right to be carried existing, a necessary result of it is that the rights and obligations of passenger and carrier attach. These cannot be affected by the character of the passenger so long as his conduct as such is correct. The law does not discriminate as to the rights of persons to redress for wrongs to their physical being or their property. If bad character should be ground for reducing damages, good character would be reason for increasing them. Rights given by statute are not denied because of

<sup>1</sup> *Abbot v. Tolliver*, 71 Wis. 64, 36 N. W. Rep. 622. It is to be observed of this case that it would doubtless have been decided as it was independently of this proposition.

<sup>2</sup> *Boyle v. Case*, 18 Fed. Rep. 880.

<sup>3</sup> *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 240, 3 Am. Rep. 245; *Hardy v. Minneapolis, etc. R. Co.*, 36 Fed. Rep. 657.

In *Brown v. Memphis & C. R. Co.*, 7 Fed. Rep. 51, 5 id. 499, *Hammond, J.*, ruled, after full consideration, that the presence of an alleged prostitute in a ladies' car, no misconduct being indulged in there, and the immorality being confined to the private life of the passenger, was not sufficient ground for excluding her therefrom.

the character of the citizen if there is no exception made by the legislature. A homestead right is not lost because the owner uses the property for an immoral and unlawful purpose.<sup>1</sup> Another reason for disapproving the Wisconsin case is that the introduction of such a question opens up too wide a field for the consideration of courts and juries, and adds vast elements of uncertainty to verdicts. So far as we have been able to ascertain, the character of a plaintiff is not material when he seeks to recover for an injury to his person or property, unless it contributed to provoke the wrong complained of.<sup>2</sup>

**§ 95. Mental suffering.** There has been a marked development of the law concerning liability for mental anguish or pain since the publication of the first edition of this work. It was then well settled that such pain, when it resulted from physical injury, was an element of damages. There was originally a little hesitancy on the part of some courts in reaching

<sup>1</sup> Prince v. Hake, 75 Wis. 638, 44 N. W. Rep. 825.

<sup>2</sup> Where the plaintiff was unemphoyed when injured and the testimony tended to show that his habits were dissolute, that he kept a house of doubtful character and had, before his injury, been discharged from several employments, it was contended that the defendant had the right to lay before the jury any facts concerning the plaintiff's conduct, habits, character or repute which might throw light on the probability of his securing employment, and the character and continuity of the same. The answer was that the doctrine could not be carried to that extent. The defendant undoubtedly had the right to lay before the jury any facts concerning the plaintiff's habits or conduct which might throw light on the probability of his securing employment, and the character and continuity of the same, but we know of no rule which would permit the defendant to go into proof of the plaintiff's character or repute. Kings-

ton v. Fort Wayne & E. R. Co., 112 Mich. 40, 40 L. R. A. 131, 74 N. W. Rep. 230.

It may be shown that the plaintiff was a sober and industrious man, his earning power being an element of damages. Metropolitan St. R. Co. v. Kennedy, 82 Fed. Rep. 158.

If the injuries for which a recovery is sought were the result of a life of dissipation, or commonly follow such a life, the fact may be shown. State v. Detroit, 113 Mich. 643, 72 N. W. Rep. 8.

In a civil action for an assault with intent to ravish, the defendant may show in mitigation of actual damages that the plaintiff was vulgar and obscene in conduct and language. Parker v. Coture, 63 Vt. 155, 21 Atl. Rep. 494, 25 Am. St. 750. But in such an action the general good character of the defendant cannot be shown, nor can the general reputation of the defendant as to chastity. Sayen v. Ryan, 9 Ohio Ct. Ct. 631. See ch. 36.

that conclusion,<sup>1</sup> but there is now no dissent from it.<sup>2</sup> The mental suffering which can thus be recovered for must proceed from and be caused by the act or neglect which produced the physical injury.<sup>3</sup> The bodily hurt which gives a right of recovery for the resulting mental suffering may be very small; if it is a ground of action it is enough.<sup>4</sup> In actions for assault and battery the jury may consider, not only the mental distress which accompanies and is a part of the bodily pain, but that other condition of the mind of the injured person which is caused by the insult of the blows he received.<sup>5</sup> The same state of mind is an element of damage when an assault has been maliciously made,<sup>6</sup> though no actual physical harm was done.<sup>7</sup> Thus one who assaults a woman with criminal intent, "though her body be not touched, except by his foul breath and speech, should respond in damages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act."<sup>8</sup> In an action of tort for a wilful injury to the person the manner and manifest motive of the act may be given in evidence as affecting the question of damages, for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the

<sup>1</sup> *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245.

<sup>2</sup> *Bovee v. Danville*, 53 Vt. 183; *Ferguson v. Davis County*, 57 Iowa, 601, 10 N. W. Rep. 906; *Porter v. Hannibal, etc. R. Co.*, 71 Mo. 66, 36 Am. Rep. 454; *Indianapolis, etc. R. Co. v. Stables*, 62 Ill. 313; *Salina v. Trosper*, 27 Kan. 544. See ch. 36.

<sup>3</sup> *Bovee v. Danville, supra*; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. Rep. 831.

If injury done to the person results in a miscarriage the physical and mental suffering connected therewith is to be considered; but injured feelings following the miscarriage and not part of the pain naturally attending it are too remote. *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. A. 728.

<sup>4</sup> *Curtis v. Sioux City, etc. R. Co.*, 87 Iowa, 622, 54 N. W. Rep. 339; *Birmingham R. & E. Co. v. Ward*, 124 Ala. 409, 27 So. Rep. 471; *Canning v. Williamstown*, 1 Cush. 452, 48 Am. Dec. 613.

<sup>5</sup> *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Wadsworth v. Treat*, 43 Me. 163; *Smith v. Holcomb*, 99 Mass. 552; *Birmingham R. & E. Co. v. Ward, supra*.

<sup>6</sup> *McKinley v. C. & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748.

<sup>7</sup> *Ford v. Jones*, 62 Barb. 484; *Godard v. Grand Trunk R.*, 57 Me. 202; *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373; *Craker v. Chicago & N. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. Rep. 100.

<sup>8</sup> *Leach v. Leach*, 11 Tex. Civ. App. 699, 33 S. W. Rep. 703.

plaintiff than if it is the result of mere carelessness.<sup>1</sup> Mental suffering is an element of damage in suits for malicious prosecution, independent of other injury,<sup>2</sup> for false imprisonment,<sup>3</sup> and in some jurisdictions for the illegal issuance of an attachment against property.<sup>4</sup> A husband may recover exemplary damages for injury to his feelings in an action against one who has had criminal conversation with his wife. His right grows out of the marital relation and is independent of her right to recover damages for the same wrong in an action by her.<sup>5</sup> A parent may recover for mental suffering resulting from the abduction,<sup>6</sup> seduction,<sup>7</sup> or the harboring and secreting of a minor daughter.<sup>8</sup> These actions are brought upon the legal principle or fiction which imports the loss of service as the ground upon which a recovery is had. The damages awarded in them, however, are largely given as compensation for wounds inflicted on the mind. Such actions are distinguishable from another class in which mental distress is an element of damage, because the facts out of which they arise affect the social and business standing of the parties plaintiff, and in many ways tend to harass and annoy and even degrade them in the eyes of the community. To some extent this is the effect of various indignities which are suffered; and because of it a passenger who is wrongfully and publicly ejected from a train may recover for the effect of the insult and indignity to his feelings, though the case does not warrant the imposition of punitive damages.<sup>9</sup> In Texas mental suffering

<sup>1</sup> *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

<sup>2</sup> *Parkhurst v. Masteller*, 57 Iowa, 474, 10 N. W. Rep. 864; *Fisher v. Hamilton*, 49 Ind. 341.

<sup>3</sup> *Stewart v. Maddox*, 63 Ind. 51; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. Rep. 799.

<sup>4</sup> *Byrne v. Gardner*, 33 La. Ann. 6; *City Nat. Bank v. Jeffries*, 73 Ala. 183. *Contra*, *Tisdale v. Major*, 106 Iowa, 1, 75 N. W. Rep. 663, 68 Am. St. 263; *Travick v. Martin-Brown Co.*, 79 Tex. 640, 14 S. W. Rep. 564.

<sup>5</sup> *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. Rep. 79.

<sup>6</sup> *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341.

<sup>7</sup> *Lunt v. Philbrick*, 59 N. H. 59; *Barbour v. Stephenson*, 32 Fed. Rep. 66; *Stevenson v. Belknap*, 6 Iowa, 97.

<sup>8</sup> *Stowe v. Heywood*, 7 Allen, 118.

<sup>9</sup> *Smith v. Pittsburgh, etc. R. Co.*, 23 Ohio St. 10; *Lake Erie, etc. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Hays v. Houston, etc. R. Co.*, 46 Tex. 272; *Smith v. Leo*, 92 Hun, 242, 36 N. Y. Supp. 949; *Mabry v. City Electric R. Co.*, — Ga. —, 42 S. E. Rep. 1025, 59 L. R. A. 590; *Curtis v. Sioux City, etc.*

is an element of damage where it results from the breach of a carrier's contract.<sup>1</sup> The authorities generally do not go so far as to allow damages for the disappointment, annoyance and vexation which result from the breach of such a contract.<sup>2</sup> A bank which maliciously and wilfully refuses to honor its depositor's checks is liable, in addition to actual money damages, for "such substantial damages for the impairment of his credit and for his feelings and mental anxiety over the matter as directly and proximately resulted from" its acts.<sup>3</sup>

Injured feelings are not to be regarded in awarding damages for wrongs done to property through gross carelessness, no act or word of insult or contumely or any intentional violation of plaintiff's rights being shown.<sup>4</sup> Thus in an action growing out of negligence in blasting rocks and throwing them upon the plaintiff's land and buildings, his mental anxiety concerning his personal safety or that of his family, no harm being done to his or their persons, is not an element of damage. The court was unable to find any case which held that mental suffering alone, caused by simple actionable negligence, can sustain an action.<sup>5</sup> But if property is injured in wilful disregard of the rights of its owner, injuries to his feelings may be compensated; as where the remains of a deceased child are removed from a burial lot in which they are rightfully interred,<sup>6</sup> or the right to inter a dead body is denied after all prepara-

R. Co., 87 Iowa, 622, 54 N. W. Rep. 339.

In the last case a girl was ejected in the presence of her schoolmates and other acquaintances without malice or unnecessary rudeness, notwithstanding there was both indignity and insult in the sense that the wrong was done in a humiliating and offensive manner: the mental pain resulting was a proper element of compensatory damages. *Contra*, Illinois R. Co. v. Sutton, 53 Ill. 397, in the absence of wilfulness or malice. See § 943.

<sup>1</sup> St. Louis, etc. R. v. Berry, 15 S. W. Rep. 48. The extra expense incurred by the plaintiff on account of his delay and the failure to receive

his baggage was \$90; a verdict for \$500 was sustained. See § 953.

<sup>2</sup> Walsh v. Chicago, etc. R. Co., 42 Wis. 23, 24 Am. Rep. 376; Hamlin v. Great Northern R. Co., 1 H. & N. 408. See ch. 21.

<sup>3</sup> Davis v. Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. Supp. 764.

<sup>4</sup> White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454.

<sup>5</sup> Wyman v. Leavitt, 71 Me. 227; Trigg v. St. Louis, etc. R. Co., 74 Mo. 147; Ewing v. Pittsburgh, etc. R. Co., 147 Pa. 40, 23 Atl. Rep. 340, 14 L. R. A. 666.

<sup>6</sup> Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Jacobus v. Children of Israel, 107 Ga. 522, 33 S. E. Rep. 853, 73 Am. St. 141.



tions for the burial have been made.<sup>1</sup> Mental pain cannot be compensated for in an action for forcible entry and detainer,<sup>2</sup> nor in an action to recover for adding to the height of a division fence and refusing to remove it.<sup>3</sup> Inconvenience, unaccompanied by pecuniary loss, is not an element of damage for being deprived of the use of property.<sup>4</sup> Annoyance and vexation, though accompanied by the expenditure of money in consequence of the wrongful issue of a distress warrant, are not ground for compensatory damages;<sup>5</sup> and so where they result from the invasion of a privilege, though such invasion was accompanied by pecuniary loss.<sup>6</sup>

§ 96. *Same subject.* In some jurisdictions mental suffering which occurs independently of physical harm, as the result of mere negligence, is too remote to be the ground of an action.<sup>7</sup> This rule extends to sickness resulting from the purely internal operation of fright though the latter is caused by gross negligence and the defendant ought to have known that the result which ensued would follow his act. The question whether, if the result was actually foreseen and intended, the rule would be otherwise, is undecided.<sup>8</sup> The rule of non-li-

<sup>1</sup> *Wright v. Hollywood Cemetery Corporation*, 112 Ga. 884, 38 S. E. Rep. 94, 52 L. R. A. 621.

<sup>2</sup> *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52.

<sup>3</sup> *Wolf v. Stewart*, 48 La. Ann. 1431, 20 So. Rep. 908.

<sup>4</sup> *Detroit Gas Co. v. Moreton Truck & Storage Co.*, 111 Mich. 401, 69 N. W. Rep. 659; *Williams v. Yoe*, 19 Tex. Civ. App. 281, 46 S. W. Rep. 659.

<sup>5</sup> *Smith v. Jones*, 11 Tex. Civ. App. 18, 31 S. W. Rep. 306.

<sup>6</sup> *Mason v. Dewis*, 71 S. W. Rep. 434 (Ky.).

<sup>7</sup> *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 38 L. R. A. 512, 60 Am. St. 393, 47 N. E. Rep. 88; *White v. Sander*, 168 Mass. 296, 47 N. E. Rep. 90, 60 Am. St. 390 (the last case was one of a wilful attempt to injure property, and the claim for damages for mental suffering grew out of such attempt); *Gulf, etc. R. Co. v. Trott*, 86

Tex. 412, 40 Am. St. 866, 25 S. W. Rep. 419; *Lynch v. Knight*, 9 H. of L. Cas. 577; *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. 40, 14 L. R. A. 666, 30 Am. St. 709, 23 Atl. Rep. 340; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 34 L. R. A. 783, 56 Am. St. 605, 45 N. E. Rep. 354; *Washington & G. R. Co. v. Dashiell*, 7 D. C. App. Cas. 507; *Rock v. Denis*, 4 Montreal L. R. (Super. Ct.) 356; *Russell v. Western U. Tel. Co.*, 3 Dak. 315, 19 N. W. Rep. 408; *Dorrah v. Illinois Central R. Co.*, 65 Miss. 14, 3 So. Rep. 36, 7 Am. St. 629; *Salina v. Trosper*, 27 Kan. 544; *West v. Western U. Tel. Co.*, 39 id. 93, 17 Pac. Rep. 807, 7 Am. St. 530; *Canning v. Williamstown*, 1 Cush. 452; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *The Queen*, 40 Fed. Rep. 694. See §§ 21-23a.

<sup>8</sup> *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N. E. Rep. 380, 75 Am. St. 374, 47 L. R. A. 323; *Atch-*

bility has been applied where the defendant, without malice or evil intent, dressed himself in a woman's clothes and went at dusk to the plaintiff's home with the result that she was frightened and, later, had a miscarriage;<sup>1</sup> and where the defendant, the landlord of plaintiff's sister, went to the house to collect rent, found the door ajar, opened it, walked up stairs, went inside the bedroom door, saw plaintiff in the room, asked what she was doing, waved his arms, and in a loud and apparently angry voice said: "I forbid you moving. If you attempt to move I will have a constable here in five minutes. I refuse to take possession of these premises." As a result of the plaintiff's excitement and fright St. Vitus dance was produced. The opinion contains this language: Under the pleadings mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage — a new cause of action — by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law and no statute gives it.<sup>2</sup> A different view has been taken where the defendant, knowing that one of the plaintiffs was well advanced in pregnancy, came to their house and in their yard, in the presence of such plaintiff, assaulted two negroes in a boisterous and violent manner, using profane language, the assault being accompanied by the drawing of blood, and causing the fright of the female plaintiff which was followed by a miscarriage and impairment of health. These facts gave the plaintiffs a cause of action, though it was recognized that the case was a novel one.<sup>3</sup>

On many questions respecting the recovery of damages for mental suffering or nervous shock the law is in a very unsatis-

ison, etc. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. Rep. 453. But see §§ 21 *et seq.*

<sup>2</sup> Braun v. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. Rep. 657.

<sup>1</sup> Nelson v. Crawford, 122 Mich. 466, 81 N. W. Rep. 335, 80 Am. St. 577.

<sup>3</sup> Hill v. Kimball, 76 Tex. 210, 13 S. W. Rep. 59, 7 L. R. A. 618.

factory state, it being impossible to harmonize the decisions or formulate any rule based on them. Many of the objections to recovery are devoid of real weight, assuming that the suffering or shock is the natural and proximate result of the wrong done, as it clearly was in some of the cases noted in this section — notably the Michigan case and the Illinois case. The objection that an action for such a purpose is without precedent might have been urged to defeat many causes of action which are now recognized; such an objection, generally acquiesced in, would have prevented the development of the law and denied protection to many of the most valued rights which are now protected. Occasionally a court asserts that the recognition of the right of recovery in cases of this class would crowd calendars and open the door to fraud. It may not be asserted with much confidence that such results have been experienced in jurisdictions in which the right is recognized. But if the first result should follow, it may be pertinent to inquire what are the reasons for establishing and maintaining the judicial establishments? Are they not intended to protect the rights of citizens, and to redress their wrongs? And citizens of all classes have the right to resort to them for such purposes. There is as good reason for denying redress to a citizen with a weak body which has been tortiously injured as there is in denying it to one with a weak nervous organization whose rights have been denied. The effects of physical injury on different persons, though the injury may be the same so far as external appearances go, vary greatly. But no court has refused redress for that reason. Mental suffering is an element of damages in many classes of actions, and it has not been seriously contended that the common sense of jurors has erred grievously, if at all, in awarding compensation for it. The field of uncertainty is not wider in cases of this class than in some others, and the corrective control which the courts exercise over verdicts can be relied upon to prevent the fraud concerning which such serious apprehensions are seemingly entertained in some tribunals.

The courts are almost agreed in denying redress for sympathetic mental suffering.<sup>1</sup> Thus a father cannot recover for

<sup>1</sup> See §§ 21-24.

grief and anxiety on account of mere physical injuries sustained by a child,<sup>1</sup> nor because of solicitude for his own and his child's personal safety.<sup>2</sup> Without proof of substantial harm, incapacity to pursue his ordinary employment, or some expense incurred, a seaman thrown from a boat into the water in case of a collision can recover no damages for the resulting fright.<sup>3</sup> As long ago as 1808 Lord Ellenborough charged a jury in an action brought by a husband to recover for the loss of the comfort, fellowship and assistance of his wife and the grief, vexation and anguish of mind he had undergone by reason of her injuries and subsequent death that they could only take into consideration the bruises which he had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution.<sup>4</sup> In an action brought by a husband to recover for mental suffering resulting from surgical malpractice in the performance of an operation upon his wife, the difficulties in the way of the rule suggested were considered by Christiancy, J.<sup>5</sup> The chief cause of plaintiff's distress of mind must have been the death of his wife in which the injury resulted rather than the pain she suffered during the operation and prior to her death; and it would be very difficult for a jury to apportion his mental agony or to determine how much of it was attributable to one of these causes and how much to the other. If the plaintiff has a right of action on account of his wife's suffering, why may not another of her relatives who may have sustained as much mental agony on the same account as the husband? These considerations, it is said, show the propriety and good sense of the rule which restricts the right of action for mental suffering to the person who has received the physical injury. Had the wife survived, this right of action would have been hers, and neither the husband in

<sup>1</sup> *Flemington v. Smithers*, 2 C. & P. (1826), 292; *Black v. Carrollton R. Co.*, 10 La. Ann. 33; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372, 72. Am. Dec. 745; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633. *Contra*, *Trimble v. Spiller*, 7 Mon. (Ky.) 394, 18 Am. Dec. 189. See *Owen v. Brockschmidt*, 54 Mo. 285.

<sup>2</sup> *Wyman v. Leavitt*, 71 Me. 227; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290, 30 N. W. Rep. 888; *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. Rep. 77.

<sup>3</sup> *The Queen*, 40 Fed. Rep. 694.

<sup>4</sup> *Baker v. Bolton*, 1 Camp. 493.

<sup>5</sup> *Hyatt v. Adams*, 16 Mich. 180, 197.

his own right, nor any other person, could have sustained an action for it; her death does not transfer it to him. Damages for such suffering in actions for malpractice are not favored; when allowed they are to be based upon a consideration by the jury of all the facts and circumstances and not upon statements made by witnesses as to their amount.<sup>1</sup>

The rule in England and in most of the American courts is that only compensation for the pecuniary loss which has been sustained by the death of a husband, father, child or other relative can be recovered against the wrong-doer.<sup>2</sup> The Scotch law allows a recovery for wounded feelings.<sup>3</sup> In some states, owing to the language of the statutes, other than pecuniary loss may be recovered for, as where it is expressed that the jury may award such damages "as to it may seem fair and just."<sup>4</sup> The mental and physical pain of the deceased is not to be considered by the jury in finding the injury which results from his death to the family.<sup>5</sup> But it is otherwise where the right of action of the person who dies survives to his representatives.<sup>6</sup> There must, however, be proof that mental suffering was endured by the deceased.<sup>7</sup>

### § 97. Same subject; liability of telegraph companies.

During the period between 1883 and 1893 there was a marked development of judicial sentiment in the direction of holding telegraph companies liable for mental suffering caused by negligent delay in delivering messages announcing the serious illness, death or burial of a near relative of the sender or addressee of such a message. Since 1893 the trend of judicial sentiment has changed, largely because the highest court of

<sup>1</sup> *Stone v. Evans*, 32 Minn. 243, 20 N. W. Rep. 149.

<sup>2</sup> *Blake v. Midland R. Co.*, 18 Q. B. 93; *Railroad v. Wyrick*, 99 Tenn. 500, 511, 42 S. W. Rep. 434, quoting the text. See ch. 37.

<sup>3</sup> *Paterson v. Wallace*, 1 Macq. 748.

<sup>4</sup> *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20 (ruled by a divided court); *McKeever v. Market Street R. Co.*, 59 id. 294; *Cleary v. City R. Co.*, 76

id. 240, 18 Pac. Rep. 269. See *Munro v. Dredging, etc. Co.*, 84 Cal. 515, 525, 18 Am. St. 248, 24 Pac. Rep. 303.

<sup>5</sup> *Cotton Press Co. v. Bradley*, 52 Tex. 587, 601; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391.

<sup>6</sup> *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580; *Same v. Smith*, 6 id. 174; *Collins v. East Tennessee, etc. R. Co.*, 9 id. 841.

<sup>7</sup> *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Moran v. Hollings*, 125 Mass. 93.

New York, the circuit courts of appeals of the United States and some other eminent courts have denied such liability. The courts (with the exception of that of Indiana) which declared the existence of the liability have adhered to that doctrine; but most of those which have considered it for the first time in the last ten years have ranged themselves in opposition to it. The Iowa court is an exception.<sup>1</sup> According to the view of the courts holding in accordance with the latter, if a message delivered to a telegraph company apprises the agent who receives it, or if he is otherwise informed, that it is of immediate importance to the party to whom it is addressed and relates to the illness, death or burial of some near member of his family, the negligent failure to deliver it makes the company liable to him for such mental distress as he may sustain in consequence, or to the sender as may be endured by him if the person who is summoned by it fails to duly arrive by reason of neglect to deliver it to him. A husband may recover for such suffering as he bears as the result of the non-delivery of a message summoning a physician to attend his sick wife;<sup>2</sup> and there may be a recovery for the increased physical and mental suffering the wife endures on account of the non-attendance of a physician,<sup>3</sup> or the absence of her husband;<sup>4</sup> and for the husband's disappointment and suffering in being kept away from the bedside of his sick wife;<sup>5</sup> for a sister's grief at being prevented from attending a brother in his last illness and arranging for his burial.<sup>6</sup> Formerly, in Indiana, a husband who telegraphed his brother-in-law that his wife was not expected to live could recover for his mental suffering arising from the fact that the person to whom the message was sent failed to come.<sup>7</sup> Other cases in harmony

<sup>1</sup> *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752, 62 N. W. Rep. 1, 57 Am. St. 294, 28 L. R. A. 72.

<sup>2</sup> *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. 148, 7 So. Rep. 419.

<sup>3</sup> *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. A. 728, 10 Am. St. 772.

<sup>4</sup> *Thompson v. Western U. Tel. Co.*, 107 N. C. 449, 12 S. E. Rep. 427.

<sup>5</sup> *Beasley v. Western U. Tel. Co.*,

39 Fed. Rep. 181; *Young v. Same*, 107 N. C. 370, 11 S. E. Rep. 1044, 9 L. R. A. 669, 22 Am. St. 883.

<sup>6</sup> *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 Am. St. 864, 8 S. W. Rep. 574.

<sup>7</sup> *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 24 N. E. Rep. 163, 7 L. R. A. 583; overruled in *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. Rep. 674, 1080. See § 977.

with those considered are cited in the note,<sup>1</sup> as also some which are opposed.<sup>2</sup> If anxiety or distress exists because of knowledge of the illness of a relative, its continuance as the result of the negligent failure to deliver a message which would remove or alleviate it is not an element of damage.<sup>3</sup> Neither is mental distress which has its origin in alarm at and sympathy for another's sufferings.<sup>4</sup> If a telegraph company undertakes to transmit money, with knowledge that a failure to do so with promptness will cause mental distress, it is liable for its neglect to be prompt.<sup>5</sup>

In order that a company shall be liable to the addressee of a message for mental suffering occasioned by negligent failure to transmit or deliver the announcement of the illness or death of the person who may be named therein, it must be shown that the message disclosed, or that the operator was informed of, the relation of the parties or the importance of promptness in its delivery.<sup>6</sup> It is enough to establish such liability if the language of the message is reasonably sufficient to put the

<sup>1</sup> So *Relle v. Western U. Tel. Co.*, 55 Tex. 310, 40 Am. Rep. 805; *Stuart v. Same*, 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. Rep. 351; *Gulf, etc. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Western U. Tel. Co. v. Wilson*, 69 Tex. 739; *Same v. Adams*, 75 id. 531, 16 Am. St. 920, 12 S. W. Rep. 857, 6 L. R. A. 844; *Same v. Feegles*, 75 Tex. 537, 12 S. W. Rep. 860; *Chapman v. Western U. Tel. Co.*, 90 Ky. 265, 13 S. W. Rep. 880; *Western U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. 843, 10 S. W. Rep. 734. See ch. 22.

<sup>2</sup> *West v. Western U. Tel. Co.*, 39 Kan. 93, 17 Pac. Rep. 807, 7 Am. St. 530; *Russell v. Same*, 3 Dak. 315, 19 N. W. Rep. 408. See ch. 22.

<sup>3</sup> *Rowell v. Western U. Tel. Co.*, 75 Tex. 26, 12 S. W. Rep. 534.

<sup>4</sup> *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. A. 728, 10 Am. St. 772.

<sup>5</sup> *Western U. Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. Rep. 385. A telegram was received at G., Texas, by the agent of a woman who sent

it from L., California, informing him that her husband had died at L., and that she would leave there the next day, and requesting him to send her \$200. When received at G. the message purported to have been sent from S. It was not repeated. The woman's agent expressed to the company's agent his belief that the message was sent from L., but after being assured that there was no mistake in this respect applied for the transfer of the money to S., which was done, without any effort on defendant's part to ascertain whether an error had been made. The money did not reach the applicant. The company was held liable for her mental suffering.

<sup>6</sup> *Russell v. Western U. Tel. Co.*, 3 Dak. 315, 19 N. W. Rep. 408; *Western U. Tel. Co. v. Brown*, 71 Tex. 723, 2 L. R. A. 766, 10 S. W. Rep. 323; *Western U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. 37, 13 S. W. Rep. 70.

company upon inquiry as to the relationship, and inform it that its object is to afford the person to whom it is addressed an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death.<sup>1</sup> A different view is taken in Indiana. The message delivered read "my wife is very ill, not expected to live." In an action by the sender to recover for mental suffering it was ruled that the language was not a hinderance thereto. The court say: It is true there was nothing in the telegram to indicate the kinship that existed between the appellant and the person to whom it was addressed; nor did it request his presence at the bedside of the sick person; but this affords no excuse to the appellee for its failure to deliver the telegram. It was bound to know that the message pertained in some way to the serious illness of the appellant's wife, and therefore that prompt communication with the person to whom the message was addressed was much desired, and was bound to know that mental anguish might and most probably would come to some person in case it failed to act promptly in transmitting and delivering the dispatch; and therefore such a result was contemplated when the message was delivered to its agent. Whether such mental suffering would be caused by the failure of a brother-in-law and his wife to go at once to the bedside of a dying sister-in-law or from the failure of a physician to reach his patient while there was still hope that something might be done to bring relief, and possibly a restoration to health, or for some other cause, is unimportant. It was not the particular cause but the effect which might be produced that was contemplated by the parties, and which is to be looked to in determining the question of liability.<sup>2</sup>

§ 98. **Right to compensation not affected by motive.** So far as pecuniary elements of damage and full compensation for injury are concerned, either in actions of tort or for breach of contract, the right of recovery is wholly independent of the motive which induced the act or omission which constitutes

<sup>1</sup> *Western U. Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. 25, 12 S. W. Rep. 844; *Same v. Feegles*, 75 Tex. 537, 12 S. W. Rep. 860.

<sup>2</sup> *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 300, 24 N. E. Rep. 163, 7 L. R. A. 583.



the cause of action.<sup>1</sup> In tort the motive may increase the injury and give a right to greater compensation; but in actions upon contract this can seldom occur, because contracts are not often made for such objects that a breach can be committed in such manner as to involve other than pecuniary consequences.<sup>2</sup> In cases of tort, if the defendant's motive does not enhance the actual injury, it cannot necessitate the allowance of larger damages to compensate it; though, by possibility, it may afford cause for imposing exemplary damages.

§ 99. **Distinction made for bad motive; contracts.** Important distinctions, however, are made against parties who break their contracts as well as against wrong-doers, where the cause of action originates in a bad motive. On executory contracts for the sale of land the vendor who wilfully breaks his contract or is unable to fulfill for causes known to him when he entered into it will be subject to damages for the loss of the bargain;<sup>3</sup> while a vendor who, in good faith and [160] without fault, finds himself unexpectedly unable to fulfill is only liable to refund the consideration with interest and expenses.<sup>4</sup> The general rule undoubtedly is that in actions upon contracts the motives which induce breaches of them cannot be considered in awarding damages. In addition to the cases above stated and those indicated in the next paragraph of this section, as coming within the exception to this rule, actions for breach of marriage promise may be added.<sup>5</sup> There is a

<sup>1</sup> *Krom v. Schoonmaker*, 3 Barb. 647; *Bridgewater Gas Co. v. Home Gas Fuel Co.*, 7 C. C. A. 652, 59 Fed. Rep. 40; *Bromfield v. Jones*, 4 B. & C. 380. See § 43.

<sup>2</sup> In *Enders v. Skannal*, 35 La. Ann. 1000, it is ruled that if a breach of contract is made in a way and accompanied by acts which constitute an offense against the law, the damages are not limited to the actual pecuniary loss. See § 77.

<sup>3</sup> *Pumpelly v. Phelps*, 40 N. Y. 59; *Bush v. Cole*, 28 id. 261, 84 Am. Dec. 343; *Drake v. Baker*, 34 N. J. L. 358; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Stephenson v. Harrison*, 3 Litt. 170; *Hammond v. Han-*

*nin*, 21 Mich. 374, 4 Am. Rep. 490; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Engel v. Fitch*, 9 B. & S. 85, 10 id. 738. See § 581.

<sup>4</sup> *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C. 416; *Sikes v. Wild*, 1 B. & S. 587, 4 id. 421; *Bain v. Fothergill*, L. R. 6 Ex. 59, L. R. 7 H. of L. 158; *McNair v. Compton*, 35 Pa. 23; *Conger v. Weaver*, 20 N. Y. 140. See § 578.

<sup>5</sup> *Duche v. Wilson*, 37 Hun, 519; *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125, 142, 148.

The standard writer on the law of damages in England says: "With the single exception of actions for breach of promise of marriage I am

probability that, owing to the complete obliteration of the distinction formerly existing as to the forms of actions, some misunderstanding may arise on this question. The rule prevails in some states that where the injuries complained of grew out of a contract, though a tort was connected with it, if the claims for both wrongs are so related that they may be conveniently and appropriately tried together, this may be done.<sup>1</sup> An action so tried cannot be said, with any regard to legal accuracy, to be an action upon contract. It is an action brought upon the theory that legal rights growing out of a contract have been violated or legal duties resting thereon neglected. As applied to a carrier, the contract it makes with a passenger gives him the right to be carried safely and put down at the place he has designated; the failure to do either is a tort. The carrier is engaged in an employment which devolves a duty upon him; an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast.<sup>2</sup> A distinction may very properly be made as to the measure of damages for the breach of a contract where the manner of the party in the wrong is offensive or such as to cause reasonable apprehension of danger to the other.<sup>3</sup>

A *quantum meruit* claim for services which were rendered in part performance of a special contract has been made in some jurisdictions to depend on the motive of the servant or contractor in his abandonment of the contract; and compensation for such performance has been allowed only to the laborer or contractor who has acted in good faith; has broken his con-

not aware of any cases in which it has been held in England that the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, could be considered in damages where the action is on the contract." Mayne's Dam. (6th ed.) p. 43.

<sup>1</sup> Houston, etc. R. Co. v. Shirley, 54 Tex. 125, 148; Ball v. Britton, 58 id. 57; G., C. & S. F. R. Co. v. Levy, 59

id. 542, 46 Am. Rep. 269; New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660; Wadsworth v. Western U. Tel. Co., 86 Tenn. 695, 6 Am. St. 864, 8 S. W. Rep. 574; Mentzer v. Western U. Tel. Co., 93 Iowa, 752, 62 N. W. Rep. 1, 57 Am. St. 294, 28 L. R. A. 72.

<sup>2</sup> Jarvis, C. J., in Courtenay v. Earle, 10 C. B. 73, 83, interpreting Brown v. Boorman, 11 Cl. & F. 1.

<sup>3</sup> Enders v. Skannal, 35 La. Ann. 1000.

tract through inability or mistake; and has been denied to the party who has wilfully and selfishly abandoned it.<sup>1</sup> Other cases may be cited where a more liberal scope is allowed in estimating damages for a fraudulent or wanton violation of contract than is ordinarily given in the absence of the element of fraud.<sup>2</sup>

**§ 100. Motive in tort actions.** The motive with which a wrong is done in some cases affects the rule by which compensation is measured or losses estimated. Where there is [161] fraud or other intentional wrong compensatory damages are given with a more liberal hand by juries and their verdicts in such cases are less closely scanned by courts than in cases where that element is absent. There is a tendency, too, to be less strict in the exclusion of remote and uncertain damages, though for this there is doubtful warrant.<sup>3</sup> Where the damages are certain, as for the taking or destruction of property having a well-known and provable value, the rule of compensation is generally the same, whether the loss is by tort or by breach of contract and whether the wrong was wilful or not. But there is a more liberal allowance of damages where the tort is an aggressive one, and the entire damages or some part of them are not capable of measurement by some standard of

<sup>1</sup> *Yeats v. Ballentine*, 56 Mo. 530; *Kelly v. Bradford*, 33 Vt. 35; *Austin v. Austin*, 47 Vt. 311; *Britton v. Turner*, 6 N. H. 495; *Sinclair v. Tallmadge*, 35 Barb. 602; *Hayward v. Leonard*, 7 Pick. 181; *Atkins v. Barnstable*, 97 Mass. 428; *Snow v. Ware*, 13 Met. 42; *McKinney v. Springer*, 3 Ind. 59; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *McDonald v. Montague*, 30 Vt. 357; *Cullen v. Sears*, 112 Mass. 299; *Cardell v. Bridge*, 9 Allen, 355; *Walker v. Orange*, 16 Gray, 193; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Veazie v. Bangor*, 51 Me. 509; *Laton v. King*, 19 N. H. 280; *Bertrand v. Byrd*, 5 Ark. 651; *Wilson v. Wagar*, 26 Mich. 452; *Horn v. Batchelder*, 41 N. H. 86; *Tait v. Sherman*, 10 Iowa, 60; *Baltimore & O. R. Co. v. Lafferty*,

2 *W. Va.* 104; *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62; *Thornton v. Place*, 1 M. & R. 218; *Newman v. McGregor*, 5 Ohio, 349, 24 Am. Dec. 293; *Carroll v. Welch*, 26 Tex. 147; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Dermott v. Jones*, 23 How. 220; *Norris v. School District*, 12 Me. 293, 28 Am. Dec. 182.

<sup>2</sup> *Dewint v. Wiltse*, 9 Wend. 325; *Jeffrey v. Bigelow*, 13 id. 518, 28 Am. Dec. 476; *Chitty on Contracts*, 684; *Sondes v. Fletcher*, 5 B. & Ald. 835; *Rose v. Beattie*, 2 Nott & McC. 538; *Nurse v. Barns*, T. Raym. 77; *Stuart v. Wilkins*, 1 Doug. 18; *Williamson v. Allison*, 2 East, 446; *Ferrand v. Bouchell*, Harp. 83; *Mullett v. Mason*, L. R. 1 C. P. 559; *Smith v. Thompson*, 8 C. B. 44. See § 77.

<sup>3</sup> See § 43.

value or definite rule.<sup>1</sup> This is justified not only on the ground that the wrong was wilful or malicious, but on certain considerations which emphasize the distinction between uncertain damages caused by torts and by breaches of contracts generally. Contracts are made only by the mutual consent of the respective parties; and each party for a consideration thereby consents that the other shall have certain rights as against him which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and consequently the limitations which the law for the sake of certainty has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose the parties may decline to contract or may fix their own rule of damages, when in their nature the amount must be uncertain. Hence when suit is brought upon such contract and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss the risk of which the party voluntarily assumed on entering into the contract for the chance of benefit or advantage which it would have given him in case of performance. His position is one in which he has voluntarily placed himself and in which, but for his own consent, he could not have been placed by the wrongful act of the oppo-

<sup>1</sup> A husband who properly demeans himself is entitled to the society and assistance of his wife against all the world. Whoever deprives him thereof is liable to an action. In estimating damages each case must be determined by the circumstances attending it, and the motive of the intervening person must be ever kept in view. The cases may properly be divided into two classes: One, where a villain interferes for the purpose of seduction, or the sole ground of interference is malice; the other, where friends, usually parents, interfere for the protection of the wife and the offspring, if any. In the first class, the husband, if without fault, is always entitled to damages; in the latter, if the motive of the interven-

ing person was pure, and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed. Much will be forgiven the parents of a wife who honestly interfere in her behalf, though the interference was wholly unnecessary and may have been detrimental to her interest and happiness as well as that of her husband; still, where the motive is not protection of the wife, but hatred and ill-will of the husband, it is no answer to his action for such interference that the offenders were his wife's parents. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791, per Okey, J.

site party alone. Again, in a majority of cases upon contract there is little difficulty from the nature of the subject in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done and where, from the nature of the stipulations or the subject-matter, the actual damages resulting from a breach are more or less uncertain in their nature or difficult to be [162] shown with accuracy by the evidence under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate to the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured in case of a breach; and if they neglect this they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted. None of these considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation to the wrong-doer by which any hazard of loss should be incurred; nor has he received any consideration or chance of benefit or advantage for the assumption of such hazard; nor has the wrong-doer given any consideration or assumed any risk in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrong-doer might take or injure his property or deprive him of his right for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show with certainty he has sustained by such taking or injury. Especially would it be unjust to presume such consent and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Nor is he to

blame because the case happens to be one of this character. He has had no choice, no selection. The nature of the case is such as the wrong-doer has chosen to make it; and upon every consideration of justice he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty [163] of accurately estimating the results of his own wrongful act.<sup>1</sup>

**§ 101. How motive affects consequences of confusion of goods.** In case of a wrongful confusion of goods, that is, where one fraudulently or wrongfully intermixes his money, corn or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the law, to guard against fraud, allowed no remedy in such case according to the older authorities, but gave the entire property without any account to him whose original domain was invaded.<sup>2</sup> There is a tendency in the later adjudications, however, to confine the forfeiture to cases where otherwise the innocent owner of property so mixed cannot be adequately protected. It accords with the preceding views to charge the party whose fraudulent or tortious act caused the confusion with the duty of separating and identifying his own and with any loss resulting from his inability to do so.<sup>3</sup> And greater loss cannot properly be charged to him for the purpose of compensation. A person is not damnified by mixing his property in a mass, if from it he can withdraw what will be substantially and to all intents and purposes identical with it; and where a man can obtain all that he is entitled to, in order to be in full enjoyment of his own, the law should not bestow [164] on him the property of another.<sup>4</sup> A reasonable rule,

<sup>1</sup> Per Christiancy, J., in *Allison v. Chandler*, 11 Mich. 552; *Sharon v. Mosher*, 17 Barb. 518; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179.

<sup>2</sup> 2 Black. Com. 404; *Warde v. Eyre*, 2 Bulst. 323; *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Met. 493, 45 Am. Dec. 296; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Stephenson v. Little*, 10 Mich. 433; *Clafin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. Rep. 721; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. 174, 20 N. E. Rep. 681; *Franklin v. Gumersell*, 9 Mo. App. 84.

<sup>3</sup> *Holloway Seed Co. v. City Nat. Bank*, 93 Tex. 187, 47 S. W. Rep. 95.

<sup>4</sup> Per Campbell, J., in *Stephenson v. Little*, *supra*; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Roth v. Wells*, 29 N. Y. 486; *Nowlen v. Colt*, 6 Hill, 461.

which has much authority to support it, is that one who has confused his own property with that of other persons shall lose it when there is a concurrence of these two things: first, that he has fraudulently caused the confusion; and second, that the rights of the other party after the confusion are not capable otherwise of complete protection.<sup>1</sup> But the principle of forfeiture, except when necessary to save the rights of the innocent owner, if there has been a fraudulent admixture, cannot be said to be eliminated from our jurisprudence.<sup>2</sup> It is a doc-

41 Am. Dec. 756; *Samson v. Rose*, 65 N. Y. 411; *Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123; *Ringgold v. Ringgold*, 1 Har. & Gill, 11, 18 Am. Dec. 250; *Bryant v. Ware*, 30 Me. 295; *Stearns v. Raymond*, 26 Wis. 74; *Single v. Barnard*, 29 id. 463; *Schulenburg v. Harriman*, 2 Dill. 398, 21 Wall. 44; *The Distilled Spirits*, 11 Wall. 356; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Stuart v. Phelps*, 39 Iowa, 14; *Moore v. Bowman*, 47 N. H. 494; *Goodenow v. Snyder*, 3 G. Greene, 599; *Wood v. Fales*, 24 Pa. 246, 64 Am. Dec. 655; *Wooley v. Campbell*, 37 N. J. L. 163; *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28; *Smith v. Sanborn*, 6 Gray, 134; *Armstrong v. McAlpin*, 18 Ohio St. 184; *Holbrook v. Hyde*, 1 Vt. 286; *Treat v. Barber*, 7 Conn. 274; *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501; *Colwill v. Reeves*, 2 Camp. 575; *Albee v. Webster*, 16 N. H. 362; *Weil v. Silverstone*, 6 Bush, 698; *Wellington v. Sedgwick*, 12 Cal. 469; *Shumway v. Rutter*, 8 Pick. 443, 19 Am. Dec. 340; *Ames v. Mississippi Boom Co.*, 8 Minn. 467; *Bartlett v. Hamilton*, 46 Me. 435; *Leonard v. Belknap*, 47 Vt. 602; *Wyly v. Burnett*, 43 Ga. 438; *Griffith v. Bogardus*, 14 Cal. 410; *Frey v. Demarest*, 16 N. J. Eq. 236; *Elmer v. Loper*, 25 id. 475; *Alley v. Adams*, 44 Ala. 609; *Adams v. Wildes*, 107 Mass. 123; *Cochran v. Flint*, 57 N. H. 514; *Gray v. Parker*, 38 Mo. 160; *Fowler v. Hoff-*

*man*, 31 Mich. 215; *Fellows v. Mitchel*, 1 P. Wms. 81; *Taylor v. Plumer*, 3 M. & S. 562; 2 Kent's Com. 365; *Reed v. King*, 11 Ky. L. Rep. 615, 12 S. W. Rep. 772; *Stone v. Quaal*, 36 Minn. 46, 29 N. W. Rep. 326; *Osborn v. Cargill Elevator Co.*, 62 Minn. 400, 64 N. W. Rep. 1135; *Blodgett v. Seals*, 78 Miss. 522, 29 So. Rep. 352; *Clark v. William Munroe Co.*, 127 Mich. 300, 86 N. W. Rep. 816.

<sup>1</sup> *Id.*; *Wright v. Skinner*, 34 Fla. 453, 16 So. Rep. 335, citing the text; *Claffin v. Beaver*, 55 Fed. Rep. 576.

<sup>2</sup> *Osborne v. Cargill Elevator Co.*, 62 Minn. 400, 64 N. W. Rep. 1135; *Halloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 47 S. W. Rep. 95; *Ryder v. Hathaway*, 21 Pick. 298; *The Idaho*, 93 U. S. 575; *Jenkins v. Steanka*, 19 Wis. 126, 18 Am. Dec. 675; *Root v. Bonnema*, 22 Wis. 539; *Stephenson v. Little*, 10 Mich. 433; *Johnson v. Bal-lou*, 25 Mich. 460; *Willard v. Rice*, 11 Met. 493, 45 Am. Dec. 226; *Lupton v. White*, 15 Ves. 442; *Wingate v. Smith*, 20 Me. 287; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397; *Loomis v. Greer*, 7 Me. 386; *McDowell v. Rissell*, 37 Pa. 164; *Beach v. Schmultz*, 20 Ill. 185; *Jewett v. Dringer*, 30 N. J. Eq. 291; *Wooley v. Campbell*, 37 N. J. L. 163; *Claffin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. Rep. 721; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. 174, 20 N. E. Rep. 681; *Franklin v. Gumersell*, 9 Mo. App. 84.

trine to prevent fraud.<sup>1</sup> The general rule which favors the innocent when there has been a confusion of property so that it cannot be separated according to ownership should not be applied to the prejudice of the rights of third parties if full protection can be given to the innocent person whose goods have been thus wrongfully used.<sup>2</sup>

**§ 102. Where property sued for improved by wrong-doer.** In another class of cases, closely analogous to those relating to confusion of goods, where a tortious taker of property has by his labor enhanced its value, the owner's title not being divested, the latter may retake the same, subject to certain limitations, in its improved condition.<sup>3</sup> He is precluded from [165] exercising this right when property so taken has lost its identity. But the change which will be deemed to destroy identity where the wrong-doer took the property in good faith, supposing it to be his own, or through some other mistake or inadvertence, will not so destroy it as to determine the owner's title and put him to his action for damages, if the taking was an intentional wrong. While the authorities are in great confusion on this subject, there is a manifest discrimination against the wilful wrong-doer. By the civil law and the common law alike the owner of the original materials is precluded from following and reclaiming the property after it has undergone a transmutation which converts it into an article substantially different,<sup>4</sup> as by making wine out of another's grapes, oil from his olives, or bread from his wheat; but the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted.<sup>5</sup> And a very large increase in the value of the property by labor has been

<sup>1</sup> *Wooley v. Campbell*, 37 N. J. L. 163.

<sup>2</sup> *National Park Bank v. Goddard*, 9 N. Y. Misc. 626, 30 N. Y. Supp. 417. See *Hall v. Hagardine-McKittrick Dry Goods Co.*, 23 Tex. Civ. App. 149, 55 S. W. Rep. 747.

<sup>3</sup> *Final v. Backus*, 18 Mich. 218; *Brown v. Sax*, 7 Cow. 95; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 353; *Curtis v. Groat*, 8 Johns. 168; *Halleck v. Mixer*, 16

Cal. 574, 76 Am. Dec. 551; *Moody v. Whitney*, 34 Me. 563; *Chandler v. Edson*, 9 Johns. 362; *Riddle v. Driver*, 12 Ala. 590; *Hyde v. Cookson*, 21 Barb. 92; *Dunn v. Oneal*, 1 Sneed, 106, 60 Am. Dec. 140; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 753.

<sup>4</sup> 2 Bl. Com. 404.

<sup>5</sup> *Id.*; *Wetherbee v. Green*, 23 Mich. 311, 7 Am. Rep. 652; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Swift v. Barnum*, 23 Conn. 523.



held to have the same effect in favor of such an involuntary wrong-doer.<sup>1</sup> The law allows him in such cases to make title by his own wrong, it not being wilful, to prevent his suffering the loss of his labor, and not because of the supposed impossibility of tracing the original materials into the more valuable property made therefrom. The authorities, however, are so much in conflict that no test can be deduced from them by which it can be determined what change will suffice to destroy the identity of property so as to prevent the owner from retaking it. It is not enough that trees are converted into saw-logs or timber,<sup>2</sup> into rails or posts,<sup>3</sup> into railroad [166] ties, staves, fire wood,<sup>4</sup> or shingles;<sup>5</sup> that saw-logs are made into boards,<sup>6</sup> fire wood,<sup>7</sup> or coal.<sup>8</sup>

<sup>1</sup> *Wetherbee v. Green*, *supra*.

<sup>2</sup> *Pierrepoint v. Barnard*, 5 Barb. 364; *Symes v. Oliver*, 13 Mich. 9; *Grant v. Smith*, 26 id. 201; *Gates v. Rifle Boom Co.*, 70 id. 309, 38 N. W. Rep. 245; *Arpin v. Burch*, 68 Wis. 619, 32 N. W. Rep. 681.

<sup>3</sup> *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; *Millar v. Humphries*, 2 A. K. Marsh. 446.

<sup>4</sup> *Smith v. Gonder*, 22 Ga. 353; *Heard v. James*, 49 Miss. 236; *Brewer v. Fleming*, 51 Pa. 102; *Moody v. Whitney*, 34 Me. 563.

<sup>5</sup> *Betts v. Lee*, 5 Johns. 348; *Chandler v. Edson*, 9 id. 362.

<sup>6</sup> *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Davis v. Easley*, 13 Ill. 192.

<sup>7</sup> *Eastman v. Harris*, 4 La. Ann. 193.

<sup>8</sup> *Riddle v. Driver*, 12 Ala. 590; *Curtis v. Groat*, 6 Johns. 168.

In *Silsbury v. McCoon*, 3 N. Y. 386, 53 Am. Dec. 753, it is said: "In one case (5 Hen. 7, fol. 15) it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this, in many cases, is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court

say that if grain be made into malt it cannot be reclaimed by the owner because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now, as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (*Moore's Rep.* 20) trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, 'because the greater part of the substance remained.' But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put into the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the cases of leather made

[167] § 103. **Same subject.** There is not the same difficulty under the authorities in determining when the identity of the property is lost where the tortious taking and conversion were fraudulent. In such a case it is well settled in New York

into a garment, logs made into lumber or boards, cloth into a coat, etc. There is therefore no definite settled rule on this question. . . . There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of providing the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet, in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection the original materials must be traced by the testimony of witnesses from hand to hand through the process of transformation."

Cooley, J., in *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653, said of making out the identity by the senses, that it is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party, and the penalty inflicted upon the other, as near as circumstances will

permit, to the rules of substantial justice. It may often happen that no difficulty may be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of the original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it and held liable for the original value only. Such distinctions in the law would be without reason and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it,—not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original mate-

that the wrong-doer is not permitted to acquire property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided it can be proven that the improved article was made from [168] the original material.<sup>1</sup> The action was trover in which this doctrine was first held, and the value of whisky was recovered by the owner of the corn from which it was made. There is a general inclination elsewhere to find some middle ground upon which the rights of the owner may be maintained, and yet moderate and adjust the consequences of even a wilful trespass more nearly to the standard of compensation, especially where there is not an actual taking of the property and the owner by choice or otherwise seeks to recover the value in damages.<sup>2</sup> And if an actual retaking is impossible or [169]

rials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant. No test which satisfies the reason of the law can be applied in the adjustment of the question of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation which, however radical, neither is expensive to the party making it nor adds materially to the value." See *Silsbury v. McCoon*, 4 Denio, 332; *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Single v. Schneider*, 30 Wis. 570.

<sup>1</sup> *Silsbury v. McCoon*, *supra*; *Baker v. Hart*, 52 Hun, 363, 5 N. Y. Supp. 345; *Guckenheimer v. Angevine*, 81 N. Y. 394. See *Silsbury v. McCoon*, 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332; *Hyde v. Cookson*, 21 Barb. 92.

<sup>2</sup> In *Single v. Schneider*, 24. Wis. 301, Paine, J., said: "There is proof tending to show a mistake as to a part (of the timber tortiously cut by defendants on the plaintiff's land). . . . They are not to be regarded, therefore, as wilful trespassers. Upon these facts it seems contrary to the dictates of natural justice that the plaintiff should be allowed to wait quietly until the defendants had manufactured the logs into lumber, enhancing their value four or five fold, and then recover against them that entire value. True, it is generally recognized that a wrong-doer cannot by the change of another's property change the title. The owner may pursue it and reclaim it specifically by whatever remedy the law gives him for that purpose. If he gets it, it is his. But the apparent injustice of allowing one to avail himself of the labor and money of another, in cases similar to this, has led to a modification of this stringent rule of ownership, wherever the question is resolved into one of mere compensation in money for whatever injury the party may have suffered." This case came before the court again (30 Wis. 570), when it

does not take place, and the question is one of mere compensation for the property, the law is not quite settled that the improved value may be recovered even of the party who intentionally converted it.<sup>1</sup> In such actions the question whether the property has so changed as to be no longer capable of

appeared and was found by the jury that a part of the logs sued for in the action, which was replevin, were cut wilfully, and Cole, J., said: "The counsel for the defendant contends that, so far as the measure of damages is concerned, it is quite immaterial whether the logs were cut intentionally or through mistake; that the damages given in law as compensation for an injury should be precisely commensurate with the injury, neither more nor less; and that the plaintiff is not entitled to recover the value of the property in its improved state under the circumstances of this case. He concedes that if there was anything tending to show that the trespass was wanton or malicious, committed under circumstances of insult or aggravation, then, upon the authorities, exemplary damages might be allowed in the discretion of the jury, which might exceed or fall below the value of the property enhanced by the labor of the defendants. But he claims that when a person, though intentionally, cuts pine logs upon the wild, unoccupied land of another, to say as a matter of right the owner shall recover the enhanced value of the property manufactured into lumber or into the most expensive furniture is a rule contrary to the principles of natural justice, and not in accordance with the doctrine of the common law. We are inclined to adopt this view of the matter, although we are aware that by so doing we lay down a rule in conflict with some adjudications which may be found. But it seems to us that if the

owner is entirely indemnified for the injury he has sustained, it is quite immaterial whether the logs were cut by mistake or intentionally, unless in the latter case the trespass was of such a character as to make the doctrine of exemplary damages applicable. This was the view expressed by Mr. Justice Paine in *Weymouth v. Chicago & N. R. Co.*, 17 Wis. 550-555, 84 Am. Dec. 763, and it seems to us that it is consonant with sound principle and natural justice. It is true that was an action of trover and this is an action of replevin. But here the defendants gave the undertaking under the statute and retained possession of the property. The judgment was in the alternative for the delivery of the property to the plaintiff, in case delivery could be had, or for its value. The plaintiff does not really expect to recover the specific property, and therefore there is no valid reason for a distinction between this case and that of trover, as regards the rule of damages; it should be the same in both cases." He restates with approbation the views of Bronson, C. J., in *Silsbury v. McCoon*, 4 Denio, 332. *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739.

<sup>1</sup> *Id.*: *Moody v. Whitney*, 34 Me. 563; *Reid v. Fairbanks*, 14 C. B. 729; *Cushing v. Longfellow*, 26 Me. 306.

If the owner brings trespass or trover instead of replevin he elects to take damages according to the measure awarded in such actions — a just and fair compensation for his property as it was before the trespass. *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. Rep. 245.

identification is not important. The wrong-doer who has taken and converted another's property through mistake is chargeable with its value at the time of conversion; and the wilful wrong-doer by that standard, or the value at some intermediate point, or the final value of the improved article, according to the views of the particular court.<sup>1</sup> The liability of the innocent purchaser of property from a wilful trespasser whose labor has improved it is the value of the property when it was taken from the original owner. The defendant in such a case is not the proper subject of punishment; the plaintiff's loss is no greater than it would have been if the trespasser had been free from intentional wrong; nor is the defendant's culpability increased thereby.<sup>2</sup> To allow the owner of the original materials to recover the value increased by the subsequent [170] labor of the wrong-doer is to antagonize two fundamental rights: the right of property, and the right to due compensation for injury. The law gives its sanction to the former by

<sup>1</sup> *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Nesbitt v. St. Paul L. Co.*, 21 Minn. 491; *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151; *Adams v. Blodgett*, 47 N. H. 219; *Dresser Manuf. Co. v. Waterston*, 3 Met. 9; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Winchester v. Craig*, 33 Mich. 205; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 353; *Wood v. Morewood*, 3 Q. B. 440, note; *Hyde v. Cookson*, 21 Barb. 92; *Heard v. James*, 49 Miss. 239; *Riddle v. Driver*, 12 Ala. 590; *Greeley v. Stilson*, 27 Mich. 153. See *Isle Royale M. C. Co. v. Horton*, 37 Mich. 332.

<sup>2</sup> *Railroad Co. v. Hutchins*, 37 Ohio St. 282, 32 id. 571.

And if he purchases part only of the property converted his liability is limited to the value of such part. *Moody v. Whitney*, 34 Me. 563.

Where minerals are mined fraudulently the trespasser is liable for their value after they are severed

from the earth, without any deduction for the expense of mining. *Martin v. Porter*, 5 M. & W. 351; *Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525; *Coleman's Appeal*, 62 Pa. 252; *Ege v. Kille*, 84 id. 333; the last two cases are distinguished and limited in *Fulmer's Appeal*, 128 id. 24, 15 Am. St. 662, 18 Atl. Rep. 493. If the mining is done inadvertently or under a *bona fide* belief of right the damages are the fair value of the mineral as if the mine had been purchased. *Wood v. Morewood*, 3 Q. B. 440, note; *Hilton v. Woods*, L. R. 4 Eq. 433; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617. In an action between tenants in common, plaintiff being out of, and defendant in, possession, the damages for working an opened and developed mine are the fair marketable value of the mineral in place — the royalty due for the privilege of removing and manufacturing it in view of all the special circumstances. *Fulmer's Appeal*, *supra*; *Neel's Appeal*, 3 Penny. (Pa.) 66.

allowing the owner to retake his property by his own act or by the legal process of replevin if it still exists and can be found. Certain changes made in it or its annexation to something else which the law regards as the principal, as to certain wrong-doers at least, have been accepted as putting an end to the owner's right to retake the property though it may in fact exist, or what was obtained from or for it is still in the hands of the wrong-doer and ascertainable by testimony. There is no more necessity for severe consequences to discourage trespass or tortious conversion of property which the wrong-doer improves than where he destroys it or retains it in the same condition. The owner is entitled to no greater measure of reparation in the one case than in the other. The wrong-doer is no more culpable when he improves the property than when he does not. Therefore, since there is a recognized though indefinite limit to the owner's right to reclaim his property with any accession, and this limit is short of the ultimate point to which testimony would enable him to trace it, there is no more violation of the fundamental right of property by fixing that limit at the point of the first change than at any subsequent one. But when the redress which is given to the owner in his suit is the value or damages to compensate him for the wrong of depriving him of his property, the question is not one of allowing him to retake it, but solely of compensation for the loss of it. What is due compensation in such a case is to be ascertained on the same principles as in all other cases: the injured party is to be made good for the loss he has sustained. If his corn has been taken he is to be compensated for corn; he is no more entitled to have its value estimated by the amount of whisky which has been, than by the amount of whisky that can be, made from it, with no deduction for the manufacture, or than the amount the defendant has subsequently sold it for in consequence of the general appreciation of the commodity.<sup>1</sup>

<sup>1</sup> Railroad Co. v. Hutchins, 37 Ohio St. 282, 294.

The language of Bronson, C. J., in the reversed case in New York (Silsbury v. McCoon, 4 Denio, 336, 337), is replete with good sense and sound

judgment. He says: "The question is not, as it has been sometimes artfully put, whether the common law will allow the owner to be unjustly deprived of his property, or will give encouragement to a wilful tres-

§ 104. **Distinctions in the matter of proof.** In [172] cases of tort the principles governing the measurement of compensation are not, as a general thing, different from those which apply in actions upon contract if the tort be not wilful; there are, as we have just seen, some exceptions; and in certain cases within the influence of considerations mentioned in a preceding section,<sup>1</sup> where the injury is of such a nature or committed under such circumstances that the damages, or some part of them, cannot be ascertained by any definite or certain proof, the investigation is conducted by such rules in respect to the quantity, quality and burden of proof that the injured party may suffer no irreparable loss from the stealth, secrecy or complexity of the wrong. The purpose of the law is thus facilitated. Lord Brougham interrogatively expressed it:<sup>2</sup> "When did a court of justice, whether administered ac-

passer. It will do neither. But in protecting the owner and punishing the wrong-doer, our law gives such rules as are capable of practical application, and are best calculated to render exact justice to both parties. The proper inquiry is, in what manner, and to what extent, should the trespasser be punished; and what should be the kind and measure of redress to the injured party. A trespasser who takes iron ore and converts it into watch springs should not be hanged; nor should he lose the whole of the new product. Either punishment would be too great. Nor should the owner of the ore have the watch springs; for it would be more than a just measure of redress. Our law has, therefore, wisely provided other remedies and punishments. The owner may retake his ore, either with or without process, so long as its identity remains; and may also recover damages for the tortious taking. Or, without repossessing himself of the property, he may have an action of trespass in which the jury will not fail to give the proper damages. But the law will not allow the owner to wait

until the ore has been converted into different species of property and then seize the new product, either with or without process. Nor is the value of the new product the measure of damages, if he bring an action of trespass or trover. Although there will not be many cases where the difference between the value of the rude material and the new product will be so striking as in the case which has been mentioned, yet, in almost every instance where the chattel has been converted into a different species of property, the value of the new product will be more than the trespasser ought to pay or the owner of the chattel ought to receive. . . . As an original question, I think the owner should either reclaim the property before the new possessor has greatly increased its value, either by bestowing his labor and skill upon it, or by joining it to other materials of his own; or else that he should be restricted to a remedy by action for the damages which he has sustained."

<sup>1</sup>§ 100.

<sup>2</sup>In *Docker v. Somes*, 2 Myl. & K. 674.

according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrongdoer ever yet possess the hardihood to plead in aid of his escape from justice the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome. The answer is, 'the court will try.''' The intrinsic nature of many wrongs precludes any estimate by witnesses of damages upon the items which a jury may consider, such as bodily or mental pain, disfigurement or impaired faculties; but the jury in many cases involving elements of this nature may be aided by proof of extrinsic facts showing the *status* of the injured party. Either a tort or a breach of contract which destroys or injures anything of a lawful nature belonging to another is a wrong and injury for which, in some reasonable and practicable manner, the law will enable the injured party to measure and recover adequate compensation. Any such act which directly and injuriously affects an established business, as by destruction of the building in which it is conducted, obstructing the approaches necessary to it, fraudulently diverting custom where there was a duty to maintain the good will, by enticing away servants, or by slander or the breach of any agreement of which the profits of a business are the consideration or inducement, may require the estimate of a very uncertain loss; but the party whose misconduct or default has necessitated the inquiry cannot object to it on the ground of the uncertainty, though a court will, in such a case, proceed with caution and will not award damages upon mere conjecture.<sup>1</sup>

**§ 105. Value of property.** The value of property constitutes the measure or an element of damages in a great variety of cases both of tort and of contract, and where there are no such aggravations as call for or justify exemplary damages, in actions in which such damages are recoverable, the value is ascertained and adopted as the measure of compensation for being deprived of the property the same in actions of tort as

<sup>1</sup>Shoemaker v. Acker, 116 Cal. 239, 48 Pac. Rep. 62.



in those upon contract. In both cases the value is the legal and fixed measure of damages, and there is no discretion with the jury. It is so between vendor and vendee on the failure of either to fulfill a contract of sale and purchase; between employer and employee on a contract for the manufacture of specific articles; where there is a departure from instructions by an agent or a loss through his negligence or misconduct, or that of a bailee or trustee, as well as where there is a tortious taking or conversion by one standing in no contract relation to the owner. And, moreover, the value is fixed in each instance on similar considerations at the time when, by the defendant's fault, the loss culminates.<sup>1</sup> And a party [174]

<sup>1</sup> *Watson v. Loughran*, 112 Ga. 837, 38 S. E. Rep. 82; *Western Union Cold Storage Co. v. Ermeling*, 73 Ill. App. 394; *Sanderson v. Read*, 75 id. 190, quoting the text; *Bank of Montgomery v. Reese*, 26 Pa. 143; *Owen v. Routh*, 14 C. B. 327; *Day v. Perkins*, 2 Sandf. Ch. 359; *Shaw v. Holland*, 15 M. & W. 136; *Rand v. White Mts. R. Co.*, 40 N. H. 79; *Pinkerton v. Manchester & L. R. Co.*, 42 N. H. 424; *Bull v. Douglass*, 4 Munf. 303, 6 Am. Dec. 518; *Enders v. Board of Public Works*, 1 Gratt. 364; *Dana v. Fiedler*, 12 N. Y. 48, 62 Am. Dec. 130; *Clement & H. Manuf. Co. v. Meserole*, 107 Mass. 362; *Danforth v. Walker*, 37 Vt. 239; *Girard v. Taggart*, 5 S. & R. 19, 5 S. & R. 539, 9 Am. Dec. 327; *Ganson v. Madigan*, 13 Wis. 67; *Hale v. Trout*, 35 Cal. 229; *Springer v. Berry*, 47 Me. 330; *Dustan v. McAndrew*, 44 N. Y. 72; *Marshall v. Piles*, 3 Bush, 249; *Camp v. Hamlin*, 55 Ga. 259; *Bozeman v. Rose*, 40 Ala. 212; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Underhill v. Gaff*, 48 Ill. 198; *Bicknell v. Waterman*, 5 R. I. 43; *West v. Pritchard*, 19 Conn. 212; *Gregg v. Fitzhugh*, 36 Tex. 127; *Bush v. Holmes*, 53 Me. 417; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176; *Kribs v. Jones*, 44 Md. 396; *Moorehead v. Hyde*, 38 Iowa, 382; *Whitesett v. Forehand*,

79 N. C. 230; *Bell v. Cunningham*, 3 Pet. 69; *Farwell v. Price*, 30 Mo. 587; *Schmertz v. Dwyer*, 53 Pa. 335; *Heinemann v. Heard*, 50 N. Y. 27; *Hancock v. Gomez*, id. 668; *Parsons v. Martin*, 11 Gray, 111; *Scott v. Rogers*, 31 N. Y. 676; *Stearine, etc. Co. v. Heintzmann*, 17 C. B. (N. S.) 56; *Hutchings v. Ladd*, 16 Mich. 494; *Suydam v. Jenkins*, 3 Sandf. 641; *Kennedy v. Whitwell*, 4 Pick. 466; *Adams v. Sullivan*, 100 Ind. 8.

In *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762, 2 N. W. Rep. 755, the court say: "The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or *trover*, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others."

who is entitled to recover and must accept its value in place of the property itself should always be allowed interest on that value from the date at which the property was lost or destroyed or converted. Whether he recovers the value for the failure of a vendor or bailee to deliver, or by reason of the destruction, asportation or conversion of the property by a wrong-doer, interest is as necessary to a complete indemnity as the value itself.<sup>1</sup> The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due.<sup>2</sup>

<sup>1</sup> *Watson v. Loughran*, 112 Ga. 837, 38 S. E. Rep. 82; *Sanderson v. Read*, 75 Ill. App. 190, quoting the text; *Chapman v. Chicago, etc. R. Co.*, 26 Wis. 295, 7 Am. Rep. 81; *McCormick v. Pennsylvania Central R. Co.*, 49 N. Y. 303; *Hamer v. Hathaway*, 33 Cal. 117; *Arpin v. Burch*, 68 Wis. 619, 32 N. W. Rep. 681.

<sup>2</sup> *Suydam v. Jenkins*, 3 Sandf. 620.

## CHAPTER IV.

## ENTIRETY OF CAUSES OF ACTION AND DAMAGES.

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## SECTION 1.

## GENERAL PRINCIPLES.

[175] § 106. **Cause of action not divisible.** A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered. If he attempt to do so a recovery in the first suit, though for less than his whole demand, will be a bar to a second action.<sup>1</sup> The failure of a party to recover because he has

Pierce v. Tennessee Coal, Iron & R. Co., 173 U. S. 1, 19 Sup. Ct. Rep. 335; Trabing v. California Navigation & Imp. Co., 121 Cal. 137, 53 Pac. Rep. 644; Sloane v. Southern California R. Co., 111 Cal. 685, 44 Pac. Rep. 320, 32 L. R. A. 193; Kapischki v. Koch, 180 Ill. 44, 54 N. E. Rep. 179; Teel v. Miles, 51 Neb. 542, 71 N. W. Rep. 296; Wadleigh v. Buckingham, 80 Wis. 230, 49 N. W. Rep. 745; Wells v. National L. Ass'n, 39 C. C. A. 476, 99 Fed. Rep. 222; Alie v. Nadeau, 93 Me. 282, 44 Atl. Rep. 891, 74 Am. St. 346; Reynolds v. Jones, 63 Ark. 259, 38 S. W. Rep. 151; Thisler v. Miller, 53 Kan. 515, 42 Am. St. 302, 36 Pac. Rep. 1060; Cockley v. Brucker, 54 Ohio St. 214, 44 N. E. Rep. 590; Porter v. Mack, 50 W. Va. 581, 592, 40 S. E. Rep. 459; North British & Mercantile Ins. Co. v. Cohn, 17 Ohio Ct. Ct. 185; State v. Morrison, 60 Miss. 74; Walton v. Ruggles, 180 Mass. 24, 61 N. E. Rep. 267; Deering v. Johnson, 86 Minn. 172, 90 N. W. Rep. 363; Macdougall v. Knight, 25 Q. B. Div. 1; Commerce Exchange Nat. Bank v. Blye, 123 N. Y. 132, 25 N. E. Rep. 208; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 N. E. Rep. 772; Baird v. United States, 96 U. S. 430; Zirker

v. Hughes, 77 Cal. 235, 19 Pac. Rep. 235; Colvin v. Corwin, 15 Wend. 557; Wagner v. Jacoby, 26 Mo. 532; Smith v. Jones, 15 Johns. 229; Butler v. Wright, 2 Wend. 369; Cornell v. Cook, 7 Cow. 310; Ross v. Weber, 26 Ill. 221; Logan v. Caffrey, 30 Pa. 196; Mason v. Alabama Iron Co., 73 Ala. 270; Howard College v. Turner, 71 id. 429, 46 Am. Rep. 326; Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. Rep. 821, quoting the text; Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. Rep. 502.

A statute providing that "successive actions may be maintained upon the contract or transaction whenever, after the former action, a new cause of action has arisen thereon," does not apply to actions for additional damages happening or discovered because of some particular breach of a contract. Russell v. Polk County Abstract Co., 87 Iowa, 233, 54 N. W. Rep. 212, 43 Am. St. 381.

Various tests have been suggested for determining whether the judgment recovered in one action is a bar to a subsequent action. "The principal consideration is whether it be

mistaken his remedy does not preclude him from asserting his rights in a proper proceeding. Thus, the failure of a mortgagee of chattels to recover them by replevin from an officer by whom they were seized under execution, because the law provided a different remedy, does not bar a proper proceeding.<sup>1</sup> Nor is a judgment for the defendant in replevin, because of the statute of limitations, a bar to an action in trover not affected by that statute.<sup>2</sup> Where a sheriff recovers the value of goods taken from him in replevin, because it was not the proper remedy, the owner may recover their value in trover.<sup>3</sup> If one fails to replevy a chattel because the defendant is only a tenant in common that does not affect his title.<sup>4</sup> A judgment against the plaintiff in replevin, rendered because he failed to prove a demand, does not bar a subsequent action of that kind.<sup>5</sup> The principle forbidding the splitting of causes of action does not prevent one whose property is taken by a single trespass from maintaining replevin for so much of it as was his, and trover for the remainder, of which he was a joint owner.<sup>6</sup>

precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict or a special case. And one great criterion of this identity is that the same evidence will maintain both actions." *Kitchen v. Campbell*, 2 W. Bl. 827; *Martin v. Kennedy*, 2 B. & P. 69, 71; *Brunsdon v. Humphrey*, 14 Q. B. Div. 141.

"The question is not whether the sum demanded might have been recovered in the former action, the only inquiry is whether the same cause of action has been litigated and considered in the former action." *Seddon v. Tutop*, 6 T. R. 607.

"Though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might be recovered in another action." *Thorpe v. Cooper*, 5 Bing. 129.

"It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of the forms of action, but upon matter of substance." *Brunsdon v. Humphrey*, 14 Q. B. Div. 141.

"It is not a test of the right of a plaintiff to maintain separate actions that all the claims might have been prosecuted in a single action." *Perry v. Dickerson*, 85 N. Y. 345, 350, 39 Am. Rep. 663.

If different allegations are required in the pleading and different evidence on the hearing, the cause of action is not split. *Stark v. Starr*, 94 U. S. 477, 485.

<sup>1</sup> *Conn v. Bernheimer*, 67 Miss. 498, 7 So. Rep. 345.

<sup>2</sup> *Johnson v. White*, 21 Miss. 584.

<sup>3</sup> *Kittredge v. Holt*, 58 N. H. 191.

<sup>4</sup> *Gaar v. Hurd*, 92 Ill. 315.

<sup>5</sup> *Roberts v. Norris*, 67 Ind. 386.

<sup>6</sup> *Huffman v. Knight*, 36 Ore. 581, 60 Pac. Rep. 207.

§ 107. **Present and future damages.** If one party to a contract prevents the other from performing and thereby earning wages or realizing profits, the latter in an action brought [176] at once after the breach may recover damages which will compensate him for his loss.<sup>1</sup> Although by performance the benefits of the contract would accrue at a future time, yet, upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss, so far as he can prove it. And to facilitate the proof the court will not oblige him to anticipate the future state of the market, but will give the plaintiff the benefit of market rates at the time of the breach. Thus, in the leading case in New York<sup>2</sup> it was argued that inasmuch as the furnishing of the marble would run through a period of five years, of which only about one year and a half had expired at the time of the breach, the benefits which the contractor might have realized from the execution of the contract must be speculative and conjectural, the court and jury having no certain *data* upon which to make the estimate. The court say: "Where the contract . . . is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance."<sup>3</sup> But the parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the

<sup>1</sup>Standard Oil Co. v. Denton, 24 Ky. L. Rep. 906, 70 S. W. Rep. 292, quoting text.

<sup>2</sup>Masterton v. Mayor, 7 Hill, 61, 71.

<sup>3</sup>Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; McAndrews v. Tippet, 39 N. J. L. 105; Burrell v. New York & S. Solar Salt Co., 14 Mich. 34; Roper v. Johnson, L. R. 8 C. P. 167; Frost v. Knight, L. R. 5 Ex. 325; Sutherland v. Wyer, 67 Me. 64; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Schell v. Plumb, 55 N. Y. 592; Sibley v. Rider, 54 Me. 463; Fales

v. Hemenway, 64 Me. 373; Richmond v. Dubuque, etc. R. Co., 40 Iowa, 264; Tippin v. Ward, 5 Ore. 450; Howard v. Daly, 61 N. Y. 363, 19 Am. Rep. 285; Gifford v. Waters, 67 N. Y. 80; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; James v. Allen County, 44 Ohio St. 226, 6 N. E. Rep. 246; Eastern Tennessee, etc. R. Co. v. Staub, 7 Lea, 397; Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. Rep. 975; Kahn v. Kahn, 24 Neb. 209, 40 N. W. Rep. 135. See McEvoy v. Bock, 37 Minn. 402, 34 N. W. Rep. 740.

action which show more clearly the gains prevented by the breach of contract complained of, or the damages sustained from such a cause of action, or any other, the injurious effects of which extend into the future. This point will receive further elucidation when we come to speak of prospective damages.

§ 108. **What is an entire demand?** The reader's attention is now directed to what constitutes an entire demand or cause of action. Whether a contract be single and entire or [177] apportionable, if there is a total abandonment or breach by one party the other has a single cause of action upon the entire contract if he think proper to act upon the breach as a total one; the better opinion is that he is obliged to do so. A party has a right to break his contract on condition of being liable for the damages which will accrue therefrom at the time he elects to do so. And it is the duty of the other party when notified thereof to exert himself to make the damages as light as possible.<sup>1</sup> What default a party may treat as a total breach of a contract is not always an easy question, and its solution should be looked for in works upon contracts rather than damages, for it depends upon interpretation. Like most other questions of construction it rests upon the intention of the parties and must be discovered in each case by considering the language and the subject-matter of the contract.<sup>2</sup> If it is single and entire, or to the extent that it is so, it can be the subject of but one action against the defaulting party and the plaintiff must have performed all precedent conditions to place the other in default.<sup>3</sup> After the renunciation of a con-

<sup>1</sup> Kalkhoff v. Nelson, 60 Minn. 284. 62 N. W. Rep. 332; Parker v. Russell, 133 Mass. 74; Dillon v. Anderson, 43 N. Y. 231; Hartland v. General Exchange Bank, 14 L. T. (N. S.) 863; Willoughby v. Thomas, 24 Gratt. 522.

<sup>2</sup> Pars. on Cont. 517.

Demands resting on contracts with separate parties, though the party liable for part of them has assumed liability for the others, are not entire. Gottlieb v. Fred. W. Wolf Co., 75 Md. 126, 23 Atl. Rep. 198.

When the consideration is single

and entire the contract is so though the subject of it consists of two or more distinct and independent items. Cockley v. Brucker, 54 Ohio St. 214, 44 N. E. Rep. 590; Miner v. Bradley, 22 Pick. 457; Fish v. Folley, 6 Hill, 54.

<sup>3</sup> Id., pp. 517-527; Shinn v. Bodine, 60 Pa. 182, 100 Am. Dec. 560; Withers v. Reynolds, 2 B. & Ad. 882; Shaw v. Turnpike Co., 2 P. & W. 454; Davis v. Maxwell, 12 Met. 286; Harris v. Ligget, 1 W. & S. 301; Hopf v. Meyers, 42 Barb. 270; Crips v. Talvande, 4 McCord, 20; Herriter v. Porter, 23 Cal. 385; Brown v. Smith, 12

tinuing agreement by one of the parties the other may consider himself absolved from its obligations and may sue for damages; his recovery will be based on what he would have lost by the continued breach down to such time as the contract would be fully performed, less any benefit resulting to the other party by advantages the plaintiff may reasonably enjoy by reason of his release from performance. The latter may defer his action for the breach until the expiration of the time for the full performance of the contract.<sup>1</sup>

§ 109. **Entire demand may be severed.** A contract originally entire may be severed afterwards by the parties so as to [178] give a right of action for a part performance.<sup>2</sup> This was the case where there was an entire contract for the delivery of logs, and on delivery of a part the purchaser paid therefor partly in money and gave notes for the residue delivered.

Cush. 366; Messick v. Dawson, 2 Harr. 50; Folsom v. Clemence, 119 Mass. 473; Brannenburgh v. Indianapolis, etc. R. Co., 13 Ind. 103, 74 Am. Dec. 250; Hutchinson v. Wetmore, 2 Cal. 310, 56 Am. Dec. 327; Camp v. Morgan, 21 Ill. 255; Morgan v. McKee, 77 Pa. 228; Casselberry v. Forquer, 27 Ill. 170; Larkin v. Buck, 11 Ohio St. 561; Hall v. Claggett, 2 Md. Ch. 151; White v. Brown, 2 Jones, 403; Wagner v. Jacoby, 26 Mo. 532; Walter v. Richardson, 11 Rich. 466; Quigley v. De Haas, 82 Pa. 267; Sweeny v. Daugherty, 23 Iowa, 291; Stevens v. Lockwood, 13 Wend. 644; Blakeney v. Ferguson, 18 Ark. 347; Pinney v. Barnes, 17 Conn. 420; Farrington v. Payne, 15 Johns. 432; Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Cunningham v. Jones, 20 N. Y. 486; James v. Lawrence, 7 Harr. & J. 73; Shaffer v. Lee, 8 Barb. 412; Campbell v. Hatchett, 55 Ala. 548; Parker v. Russell, 133 Mass. 74; Norris v. Harris, 15 Cal. 226, 256, 76 Am. Dec. 480; McGrath v. Cannon, 55 Minn. 457, 57 N. W. Rep. 150; Reynolds v. Jones, 63 Ark. 259, 38 S. W. Rep. 151.

<sup>1</sup> Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. Rep. 780 (1899), following the rule of Hochster v. De la Tour, 2 El. & Bl. 678. *Contra*, Clark v. National Benefit & Casualty Co., 67 Fed. Rep. 222 (1895); Daniels v. Newton, 44 Mass. 530, 19 Am. Rep. 384. The argument in the latter case is said to have been well and sufficiently answered by Judge Lowell in Dingley v. Oler, 11 Fed. Rep. 372, where the question is examined and cases cited. To the same effect as Roehm v. Horst, *supra*, are several cases in the federal courts earlier than the decision therein: Dingley v. Oler, *supra*; Foss-Schneider Brewing Co. v. Bullock, 8 C. C. A. 14, 59 Fed. Rep. 83; Edward Hines Lumber Co. v. Alley, 19 C. C. A. 599, 73 Fed. Rep. 603; Horst v. Roehm, 84 Fed. Rep. 565. Speirs v. Union Drop Forge Co., 180 Mass. 87, 91, 61 N. E. Rep. 825, is in harmony with Roehm v. Horst.

<sup>2</sup> O'Beirne v. Lloyd, 43 N. Y. 251; Lee v. Kendall, 56 Hun, 610, 11 N. Y. Supp. 131; Fourth Nat. Bank v. Noonan, 88 Mo. 372; Ryall v. Prince, 82 Ala. 264, 2 So. Rep. 319.



It was held that the notes could be collected notwithstanding any default in the delivery of other logs to fulfill the contract, but subject to recoupment of the damages for such breach.<sup>1</sup> Under an agreement that if the creditor would forbear suing upon the whole of his demand and sue upon a part of it only, and in case of a recovery upon that part the debtor would pay the balance, it was held that such agreement was a waiver of the rule in his favor concerning the division of actions, and that the recovery upon the part sued upon was not a bar to an action upon the balance of the claim.<sup>2</sup> So a *quantum meruit* claim may arise for a part performance on account of the benefit derived from it.<sup>3</sup> A city splits up a demand against it by drawing warrants on account of it in different amounts, and cannot defend an action on one of them on the ground that it had previously been sued on another.<sup>4</sup> "In such cases the rights of the plaintiff as assignee serve as the consideration for the new contract, which becomes the ground of the action. The action is on the defendant's promise to the plaintiff, and not upon the assignment or upon any right growing out of it."<sup>5</sup> While a general assignment for the benefit of creditors does not usually effect a rescission or termination of an executory contract of the assignor,<sup>6</sup> it may be otherwise where the subject-matter of the contract establishes a relation of confidence between the parties, and the exercise of peculiar skill or knowledge is required. In such a case the plaintiff should not be compensated for what he cannot perform.<sup>7</sup>

**§ 110. Contracts to do several things successively or one thing continuously.** A contract to do several things at different times is divisible in its nature, and an action will lie

<sup>1</sup> Fessler v. Love, 43 Pa. 313.

<sup>2</sup> Mills v. Garrison, 3 Keyes, 40; Mandeville v. Welch, 5 Wheat. 277, 288; Secor v. Sturgis, 16 N. Y. 548. See Bliss v. New York Central, etc. R. Co., 160 Mass. 447, 36 N. E. Rep. 65.

<sup>3</sup> See § 90.

<sup>4</sup> Little v. Portland, 26 Ore. 235, 37 Pac. Rep. 911; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; National Exchange Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388.

<sup>5</sup> Little v. Portland, *supra*; Getchell v. Maney, 69 Me. 442; James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. Rep. 122.

<sup>6</sup> New England Iron Co. v. Gilbert E. R. Co., 91 N. Y. 153; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. Rep. 941, 48 L. R. A. 685.

<sup>7</sup> United Press v. Abell Co., 79 App. Div. 550, 80 N. Y. Supp. 454, 461.

upon each default.<sup>1</sup> The defendant, being the keeper of an office for procuring crews of vessels, in consideration of the plaintiff's agreement to furnish such supplies and advances as might be necessary in the business, promised to pay the latter a certain sum for each man shipped and to repay the advances; the defendant's undertaking was several.<sup>2</sup> But when a party has distinct demands or existing causes of action growing out of the same contract or resting in matter of account, which may be joined and sued for in the same action, they must be joined; they constitute an entire cause of action or demand; and if they be split up and a suit brought for a part only, and subsequently a second suit for the residue, the first action, if determined on the merits, will be a bar.<sup>3</sup> This is not to be carried so far as to bar an action on the contract because judgment has been obtained against the party who failed to perform for a tort resulting from the breach. Claims for a wrongful dismissal from employment and to recover wages earned prior thereto are separate and distinct causes of action. The right to wages is the result of the contract; the right to damages grows out of the wrongful termination of it. The amount due under the contract was definite or ascertainable at the time of its breach, and was then payable; the damages were incapable of exact ascertainment until the period covered by the contract expired, as they might be mitigated by the acts of the plaintiff.<sup>4</sup> But if a servant performs no labor after his discharge he can maintain but one action for the breach of the contract.<sup>5</sup> Where an employee who was permanently disabled in the service of his em-

<sup>1</sup> *Badger v. Titcomb*, 15 Pick. 409; *Basler v. Nichols*, 8 Ind. 260; *Terry v. Beatrice Starch Co.*, 43 Neb. 866, 62 N. W. Rep. 255; *Coleman v. Hudson*, 2 Sneed, 465.

<sup>2</sup> *Badger v. Titcomb*, *supra*.

<sup>3</sup> *Bendernagle v. Cocks*, 19 Wend. 207; *James v. Lawrence*, 7 Harr. & J. 73; *Atwood v. Norton*, 27 Barb. 638; *Casselberry v. Forquer*, 27 Ill. 170; *Geiser Threshing Machine Co. v. Farmer*, 27 Minn. 428, 8 N. W. Rep. 141; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. Rep. 151; *Hodge v. Shaw*, 85 Iowa, 137, 52 N. W. Rep.

8, 29 Am. St. 290; *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. Rep. 767; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. Rep. 501, 22 L. R. A. 74, 44 Am. St. 273. Compare *Williams v. Luckett*, 77 Miss. 394, 26 So. Rep. 967.

<sup>4</sup> *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

<sup>5</sup> *Waldron v. Hendrickson*, 40 App. Div. 7, 57 N. Y. Supp. 561; *Barnes v. Coal Co.*, 101 Tenn. 354, 47 S. W. Rep. 498; *Olmstead v. Bach*, 78 Md. 142, 44 Am. St. 273, 27 Atl. Rep. 501, 22 L. R. A. 74; *Wright v. Turner*, 1 Stew. 29, 18 Am. Dec. 35.

ployer compromised his claim for damages in consideration of an agreement that he should receive certain wages monthly and be furnished with specified supplies so long as his ability to work should continue, and the plaintiff, on his part, was to do for the defendant such work as he was able to do and release the defendant from liability for damages, and the defendant denied its obligation to pay the stipulated wages and entirely abandoned the contract, the plaintiff was entitled to consider the contract as entirely broken, and recover all that was due him when the action was brought and all that might become due under it, which would be its value to him at the time of the breach.<sup>1</sup> A contract to issue or procure the issuance of an annual railroad pass to be renewed from year to year during the pleasure of the promisee is divisible.<sup>2</sup>

In an action on a lease which contained distinct cove- [179]nants to pay for manure and for work and labor, the defendant pleaded in abatement that a prior action brought for the breach of certain of the covenants was still pending. The plaintiff replied that the covenants upon which that suit was brought were distinct and different from those involved in the pending action. The defendant's demurrer to this replication was sustained and he obtained judgment.<sup>3</sup> It is observed of this ruling that if it is subject to any criticism it is because of its application to the facts involved. It may be inferred from the opinion of Judge Cowen that all the covenants in the lease were for the payment of different amounts of money by the lessee to the lessor; and he seemed to regard it like the case of a contract to pay money in instalments, and in this way reached the conclusion that the different breaches constituted a single cause of action.<sup>4</sup> But it is now established in New York that the breach of an agreement to pay money in instalments is not

<sup>1</sup> *Pierce v. Tennessee Coal, Iron & R. Co.*, 173 U. S. 1, 19 Sup. Ct. Rep. 335; *Eastern Tennessee, etc. R. Co. v. Staub*, 7 Lea, 397.

<sup>2</sup> *Kansas, etc. R. Co. v. Curry*, 6 Kan. App. 561, 51 Pac. Rep. 576; *Curry v. Kansas, etc. R. Co.*, 58 Kan. 6, 48 Pac. Rep. 579.

<sup>3</sup> *Bendernagle v. Cocks*, 19 Wend.

207. See *Badger v. Titcomb*, 15 Pick. 409; *McIntosh v. Lawn*, 47 Barb. 550.

The recovery of past-due instalments of rent which accrued under a lease for a term at a fixed monthly rental does not bar another action for instalments which became due subsequently. *Barnes v. Coal Co.*, 101 Tenn. 354, 47 S. W. Rep. 498.

<sup>4</sup> *Perry v. Dickerson*, *supra*.

a breach of the entire contract, and will not permit a recovery of all the damages in advance.<sup>1</sup> "There seems to be a distinction, whether well grounded in principle or not, between a contract for the payment of money in future instalments and a contract for the delivery of goods in future instalments<sup>2</sup> as well as a contract for future employment and service."<sup>3</sup> A contract which, for an entire consideration, stipulates for the performance of several acts for the benefit of the same person at the same time is entire.<sup>4</sup>

[180] The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim [181] arising either upon a contract or from a wrong cannot be divided and made the subject of several suits;<sup>5</sup> and if several suits be brought for different parts of such a claim the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits of either will be available as a bar in the others. But it is entire claims only which [182] cannot be divided within this rule: those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon distinct causes of action. The holder of a [183] number of promissory notes may maintain an action on each; a party upon whose person or property successive and distinct trespasses have been committed may bring a separate suit for every trespass, and all demands of whatever nature arising out of independent transactions may be sued upon separately. It makes no difference that the causes of action might

<sup>1</sup> *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. Rep. 589; *McCready v. Lindeborn*, 172 N. Y. 400, 408, 65 N. E. Rep. 208.

<sup>2</sup> *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. Rep. 561.

<sup>3</sup> *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

<sup>4</sup> *Alling v. Trevor*, 25 N. Y. Misc.

390, 54 N. Y. Supp. 772 (contract for publication of advertisement in designated newspapers at stated intervals for a gross sum); *Indianapolis, etc. R. Co. v. Koons*, 105 Ind. 507, 5 N. E. Rep. 549.

<sup>5</sup> *Standard Oil Co. v. Denton*, 24 Ky. L. Rep. 966, 7 S. W. Rep. 283, quoting the text.

be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance.<sup>1</sup> The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.<sup>2</sup>

Perhaps as simple and safe a test as the subject admits of by which to determine whether the case belongs to one class or the other is by inquiring whether it rests upon one or several acts or agreements. In the case of torts each trespass, conversion or fraud gives a cause of action, and but a single

<sup>1</sup> *Secor v. Sturgis*, 16 N. Y. 554, overruling *Colvin v. Corwin*, 15 Wend. 557, and disapproving the reasoning in *Guernsey v. Carver*, 8 id. 492. See *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

<sup>2</sup> *Thisler v. Miller*, 53 Kan. 515, 36 Pac. Rep. 1060.

Where the grade of a street has been established and the plaintiff has made improvements upon property abutting thereon in conformity with such grade, and subsequently the city provides by ordinance for changing the grade, and in fact alters it from curb to curb, and afterwards adapts the sidewalk to the grade as finally established, an action for changing the sidewalk cannot be maintained after a recovery has been had for cutting down the grade from curb to curb. *Hempstead v. Des Moines*, 63 Iowa, 36, 18 N. W. Rep. 676; *Stickford v. St. Louis*, 7 Mo. App. 217 (injury to fee of one lot and to leasehold interest with rent of adjoining lot).

If goods are sold on credit at various times each sale is separate and distinct, and an independent cause of action arises on the expiration of the agreed period of credit and as the several amounts become due. *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396.

Where property is purchased in

several quantities at different times in the execution of a conspiracy, the damage done to the vendor is the gist of the action, and the cause of it is not single and entire; each purchase is a distinct and several fraud for which a separate action lies. *Lee v. Kendall*, 56 Hun, 610, 11 N. Y. Supp. 131.

Where a train was in motion and a mare and colt were running on the track in front of it, and the colt was struck and killed, and the train after running on five hundred feet struck and killed the mare, the killings were separate and independent acts; causes of action based upon them were necessarily composed of different elements, because, while the killing of the colt might have been prevented by the prompt exercise of ordinary care, the last killing was the result of gross negligence. *Missouri Pacific R. Co. v. Scammon*, 41 Kan. 521, 21 Pac. Rep. 590. See *Bricker v. Missouri Pacific R. Co.*, 83 Mo. 391; *Pucket v. St. Louis, etc. R. Co.*, 25 Mo. App. 650.

The seizure on the same day and under the same writ of two distinct lots of animals in different places, though they are owned by the same person, constitutes distinct trespasses. *Millikin v. Smoot*, 71 Tex. 759, 10 Am. St. 814, 12 S. W. Rep. 59.

[184] one;<sup>1</sup> in respect to contracts, express or implied, each affords one and only one cause of action.<sup>2</sup> The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract.<sup>3</sup> The

<sup>1</sup> *Munro v. Pacific Coast Dredging & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303, 18 Am. St. 248; *Lee v. Kendall*, 56 Hun, 610, 11 N. Y. Supp. 131; *Secor v. Sturgis*, 16 N. Y. 554; *Binicker v. Hannibal*, etc. R. Co., 83 Mo. 660; *Steiglider v. Missouri Pacific R. Co.*, 38 Mo. App. 511; *Knowlton v. New York*, etc. R. Co., 147 Mass. 606, 18 N. E. Rep. 580, 1 L. R. A. 625; *Brannenburgh v. Indianapolis*, etc. R. Co., 13 Ind. 103, 74 Am. Dec. 250; *Hicenbotham v. Lowenbein*, 6 Robert. 557; *Marble v. Keyes*, 9 Gray, 221; *Eastman v. Cooper*, 15 Pick. 276; *Bennett v. Flood*, 1 Allen, 47, 79 Am. Dec. 705; *Trask v. Hartford*, etc. R. Co., 2 Allen, 331; *Doty v. Brown*, 4 N. Y. 71.

But one cause of action arises from the conversion of various chattels at the same time; after judgment for the plaintiff for some of those converted an action cannot be maintained for the others, although he was unable to include them in the first action because of the defendant's fraudulent conduct (*McCaffrey v. Carter*, 125 Mass. 330); or because of the accidental failure to sue for them in the first action. *Folsom v. Clemence*, 119 Mass. 473; *Herriter v. Porter*, 23 Cal. 385; *Farrington v. Payne*, 15 Johns. 432; *Funk v. Funk*, 35 Mo. App. 246. See *Bowker Fertilizer Co. v. Cox*, 106 N. Y. 555, 13 N. E. Rep. 943. This is the rule, although part of the property taken was held by the plaintiff as a trustee and part in his own right. *O'Neal v. Brown*, 21 Ala. 482. A tenant who sues for damage to his crops may re-

cover for the whole injury done. *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570. Injuries done to distinct pieces of property owned by the same person, by a single act, must be sued for together. *Beronio v. Southern Pacific R. Co.*, 86 Cal. 415, 21 Am. St. 57, 24 Pac. Rep. 1093.

If the plaintiff has interests in possession and reversion he may recover in the same action for an injury affecting both. *Irving v. Media*, 10 Pa. Super. Ct. 132, affirmed without opinion, 194 Pa. 648.

<sup>2</sup> *Shires v. O'Connor*, 4 Pa. Super. Ct. 465; *Huyett & Smith Manuf. Co. v. Chicago Edison Co.*, 167 Ill. 233, 59 Am. St. 272, 47 N. E. Rep. 384; *Samuel v. Fidelity & Casualty Co.*, 76 Hun, 308, 27 N. Y. Supp. 741.

<sup>3</sup> *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389; *Gentles v. Finck*, 23 N. Y. Misc. 153, 50 N. Y. Supp. 726; *Secor v. Sturgis*, 16 N. Y. 554; *Ryall v. Prince*, 82 Ala. 264, 2 So. Rep. 319; *Wilkinson v. Black*, 80 Ala. 329; *Strauss v. Meerteif*, 64 id. 299; *Wilcox v. Plummer*, 4 Pet. 172; *Moore v. Juvenal*, 92 Pa. 484; *Reformed*, etc. Church v. Brown, 54 Barb. 191; *Campbell v. Hatchett*, 55 Ala. 548; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Pinney v. Barnes*, 17 Conn. 420; *Rudder v. Price*, 1 H. Black. 550; *Cobb v. I. C. R.*, 38 Iowa, 601; *Clayes v. White*, 83 Ill. 540; *Blakeney v. Ferguson*, 18 Ark. 347; *Kendall v. Stokes*, 3 How. 87.

In *McIntosh v. Lown*, 49 Barb. 550, it was held that the lease in question contained seven distinct and inde-

same rule governs in torts arising from contracts and those which have their origin in official misfeasance. The cause of action arises when the breach of duty occurred, not on the discovery of the effects thereof.<sup>1</sup>

§ 111. **Items of account.** Where there is an account for goods sold or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim springing in any way from contract, whether one or separate rights of action exist will, in each case, depend on whether the case is covered by one or by several or separate contracts. The several items may have their origin in one contract, as an agreement to sell and deliver goods, perform work, or advance money; and usually, in case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract or the circumstances must be such as to raise an implied contract embracing all the items to make them, where they arise [185] at different times, a single or entire demand or cause of action.<sup>2</sup>

pendent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build, during the continuance of the lease, one hundred and twenty-five rods of fence. It was held that a former action by the lessor upon the covenant for not building the fence was not a bar to an action subsequently brought upon the covenant to repair; that the two covenants were distinct and had no connection with each other, except that they were contained in the same instrument; that the former action must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the second in order to be a bar. See *Warner v. Bacon*, 8 Gray, 497, 69 Am. Dec. 253; *Clark v. Baker*, 5 Met. 452.

The services of a regularly appointed or permanently employed at-

torney are usually rendered pursuant to some general contract, and whatever is due therefor at the termination of the service or employment must be recovered in one action. *Hughes v. Dundee Mortgage Trust Investment Co.*, 26 Fed. Rep. 831.

<sup>1</sup> *Owen v. Western Saving Fund*, 97 Pa. 47, 39 Am. Rep. 794.

<sup>2</sup> *Secor v. Sturgis*, 16 N. Y. 554; *Borngesser v. Harrison*, 12 Wis. 544; *Walter v. Richardson*, 11 Rich. 466; *Magruder v. Randolph*, 77 N. C. 79; *American Button-hole & S. M. Co. v. Thornton*, 28 Minn. 418, 10 N. W. Rep. 425; *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 228; *Buck v. Wilson*, 113 Pa. 423, 6 Atl. Rep. 97; *Wren v. Winter*, 6 Ohio Dec. 176.

The Pennsylvania case cited holds that if several notes are given for the amount of an entire book account, without being taken as an extinguishment of the debt or as

The very fact that there is a running account imports that the parties have not been accustomed to treat every separate matter of charge as a distinct debt, but on the contrary to enter it in the account to become a part thereof and going to make up the debt which consists of the entire balance due.<sup>1</sup> A creditor cannot bring an action for an amount admittedly due upon an account resulting from a single contract, the whole debt being mature, enforce payment of that amount, and maintain a second action for a sum alleged to be due on the same account in excess of that first sued for; the fact that the petition in the first case recited that the right to bring such second action was reserved was immaterial.<sup>2</sup> If bills are payable at the end of every month an action, brought after two months, to recover the sum due at the end of the first month, does not bar an action to recover the amount due at the end of the second month.<sup>3</sup> The business of ship carpenters was carried on in one part of a building under the direction of two of the partners in a firm, and the business of ship chandlers in another part of the same building under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of business, and the partners confined themselves respectively to the management of one of the branches without personally taking part in the other. Work was done and materials furnished from the carpentry branch in the repairing and equipping of a brig, upon the order of her captain, to the amount of \$139, and immediately thereafter goods and articles of ship chandlery to the value of \$521 were furnished to the same brig, on the order of the same captain, at different times through a period of a month. The

consideration for an extension of time, that a suit brought upon the account after some of the notes became due, in which judgment for the amount of those due was given, bars a subsequent suit upon the same account for the amount of the notes which became due after the suit was brought. *Contra*, *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Cumington v. Wareham* 8 Cush. 590.

<sup>1</sup> *Memmer v. Carey*, 30 Minn. 458, 15 N. W. Rep. 877; *Borngesser v. Harrison*, 12 Wis. 544; *Avery v. Fitch*, 4 Conn. 362; *Lane v. Cook*, 3 Day, 255. See note to § 110.

<sup>2</sup> *Atlanta Elevator Co. v. Fulton Bag & Cotton Mills*, 106 Ga. 427, 32 S. E. Rep. 541; *Bolen Coal Co. v. Whittaker Brick Co.*, 52 Kan. 747, 35 Pac. Rep. 810.

<sup>3</sup> *Beck v. Devereaux*, 9 Neb. 109, 2 N. W. Rep. 365.



two accounts did not constitute an entire claim.<sup>1</sup> In an action for money had and received it appeared that the defendant, as steward of the plaintiff, had, between April and November, 1822, received large sums of money for timber sold, and in December, 1821, 46% for rents. In a former action a judgment had been taken by default for all that the plaintiff's agent thought the defendant could pay, but afterwards it was ascertained for the first time that the steward had received the said amount for rents. All the sums which the plaintiff knew the defendant had received at the time when he commenced the former action were considered as included in and constituting one entire cause of action, and the recovery was confined in the last action to the 46%, [186] though the defendant's actual receipts for timber were very much greater than the default judgment.<sup>2</sup>

Where the captain of a steamboat hired a barge and executed to the owner a contract to pay \$10 per day until returned in good order as received, but fixed no time when it should be returned or the money paid, it was held that the barge was to be returned in a reasonable time considering the circumstances of the service for which it was hired, the stipulated rent or hire would then be payable, the contract was entire and not divisible, and an action brought thereon after the expiration of such reasonable time for the amount then due for the hire of the barge at the rate specified in the contract was a bar to a subsequent action on the same contract for hire accruing after the period embraced in the judgment recovered in the former action.<sup>3</sup> "If the barge were not returned upon demand in a reasonable time it would be a breach of the contract for the return. The right of the party in such a case is not to exact the \$10 a day perpetually, but to charge at that rate for a reasonable time, and then to collect the value of the barge, and by suing . . . (in the former action) . . . he in effect averred that the reasonable time had expired and the whole became due."<sup>4</sup>

§ 112. Continuing obligations. Where the defendant had covenanted, in 1822, that the plaintiff should have a con-

<sup>1</sup>Secor v. Sturgis, 16 N. Y. 554.

<sup>3</sup>Stein v. Steamboat Prairie Rose,

<sup>2</sup>Bagot v. Williams, 3 B. & C. 235; 17 Ohio St. 472, 93 Am. Dec. 631.

Risley v. Squire, 53 Barb. 280.

<sup>4</sup>See Bradley v. Washington, etc. Co., 9 Pet. 107.

tinual supply of water for a mill from his dam, and totally failed to perform after 1826, and in 1835 the plaintiff brought an action for the breach and recovered damages sustained by him up to that time, it was held a bar to a second action arising from a subsequent failure to perform.<sup>1</sup> "It is true the covenant stipulated for a continued supply of water to the plaintiff's mill, and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff the right to sue [187] for an equivalent in damages. He obtained that equivalent, or should have obtained it, in the former suit." The principle has been applied to an action to recover rent under a lease for a term of years where a suit was brought to recover the rent for one month which was due when another suit was instituted;<sup>2</sup> and to an action to recover the expense of supporting a non-resident pauper, such expense accruing after the recovery in a former suit of the amount due when the trial was had.<sup>3</sup> An agreement by one party to support another during life is a similar continuing, entire contract,<sup>4</sup> if it is unconditional.<sup>5</sup> A separate action may be maintained whenever there is a new cause of action, whether it arises at the same time as another cause or at a different time; but it must exist and be complete before the action is brought.<sup>6</sup> Where the contract is indefinite as to time and negative in its character successive actions may be brought for its violation, as where one who has sold his interest in a business violates his contract not to re-engage in business in that place.<sup>7</sup>

<sup>1</sup> *Fish v. Folley*, 6 Hill, 54. See *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. 584, 30 N. E. Rep. 741.

<sup>2</sup> *Burritt v. Belfy*, 47 Conn. 323; *Reynolds v. Jones*, 63 Ark. 259, 38 S. W. Rep. 151. See § 110, particularly the late New York cases cited.

<sup>3</sup> *Marlborough v. Sisson*, 31 Conn. 332. See *Pinney v. Barnes*, 17 id. 420.

<sup>4</sup> *Parker v. Russell*, 133 Mass. 74; *Amos v. Oakley*, 131 id. 413; *Schell v. Plumb*, 55 N. Y. 592; *Sibley v. Rider*, 54 Me. 466; *Fales v. Hemenway*, 64 Me. 373; *Miller v. Wilson*, 24

Pa. 114; *Carpenter v. Carpenter*, 66 Hun, 177; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. Rep. 207. See *Ferguson v. Ferguson*, 2 N. Y. 360.

<sup>5</sup> *Fay v. Guynon*, 131 Mass. 31.

<sup>6</sup> *Howell v. Young*, 5 B. & C. 267; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Prince v. Moulton*, 1 Ld. Raym. 248; *Harbin v. Green*, Hob. 189; *Coggeshall v. Coggeshall*, 2 Strobb. 51. See *State Bank v. Fox*, 3 Blatchf. 431.

<sup>7</sup> *Just v. Greve*, 13 Ill. App. 302; *Pierce v. Woodward*, 6 Pick. 206.

§ 113. **Damages accruing subsequent to the action.** It is not essential, however, that all the injurious effects of the act which constitutes the cause of action should have been developed and suffered before suit; it is immaterial to the right to recover for them when the effects manifest themselves with reference to the time of bringing the suit. But it is practically material to the plaintiff that the effects be so manifest, before and at the time of the trial, as to be susceptible of proof. The actual effects down to the time of the trial are provable; and whether those which may ensue later may be taken into account will depend on whether they are imminent and sufficiently certain.<sup>1</sup> Interest which is the accessory of the principal does not stop at the commencement of the action, but may always be computed down to the verdict.<sup>2</sup> But whether continuing damages may be computed after the commencement of the suit will depend on whether they proceed from the act complained of in that suit as the cause of action, or from some later act constituting a fresh cause of action.<sup>3</sup> [188] A judgment creditor in lieu of her judgment agreed to accept the bond of another conditioned for her maintenance during life, or to pay her if she preferred it \$150 per annum; the bond to be secured by a mortgage on the land of the obligor. The defendant was employed to prepare the instrument and to have the mortgage entered of record; he withheld it from

<sup>1</sup> *Bryson v. McCone*, 121 Cal. 153, 53 Pac. Rep. 637; *Samuel v. Fidelity & Casualty Co.*, 76 Hun, 308, 27 N. Y. Supp. 741; *Salzgeber v. Mickel*, 37 Ore. 216, 60 Pac. Rep. 1009; *Conlon v. McGraw*, 66 Mich. 194, 33 N. W. Rep. 388; *Coles v. Thompson*, 7 Tex. Civ. App. 666, 27 S. W. Rep. 46; *Cook v. Redman*, 45 Mo. App. 397, citing the text; *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011; *Filer v. New York Central R. Co.*, 49 N. Y. 42; *Hayden v. Albee*, 20 Minn. 159; *Hagan v. Riley*, 13 Gray, 515; *Spear v. Stacy*, 26 Vt. 61; *Fort v. Union Pacific R. Co.*, 2 Dill. 259; *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. Rep. 138; *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32

Am. Rep. 451 (violation of contract to pass plaintiff and his family during their lives over defendant's road).

<sup>2</sup> *Robinson v. Bland*, 2 Burr. 1077; *Hovey v. Newton*, 11 Pick. 421; *Duncan v. Markeley*, Harp. 276.

<sup>3</sup> *Eastern Tennessee, etc. R. Co. v. Staub*, 7 Lea, 397; *Pierce v. Tennessee Coal, Iron & R. Co.*, 173 U. S. 1, 19 Sup. Ct. Rep. 335; *Haskell County Bank v. Bank of Santa Fe*, 51 Kan. 39, 32 Pac. Rep. 624; *Troy v. Cheshire R. Co.*, 23 N. H. 102; *Hicks v. Herring*, 16 Cal. 566; *Phillips v. Terry*, 3 Keyes, 313; *Cosgriff v. Miller*, — Wyo. —, 68 Pac. Rep. 206, 216, quoting the text.

record until the property became otherwise incumbered by claims to an amount beyond its value and the debtor insolvent. It was held in an action on the case that the injured party could recover all that she had lost or was likely to lose by the default; all that the mortgage if duly recorded would have been worth to her.<sup>1</sup> Where the defendant under-

<sup>1</sup> *Miller v. Wilson*, 24 Pa. 114. Black, C. J., said: "The argument is made that the plaintiff has not yet suffered any loss from the defendant's violation of duty, and that she can recover from Miller only in case Carson (the obligor in the bond) makes default, because the mortgage being but a security for the bond there is nothing due on the former until the condition of the latter is broken. But we hold it clear law that Miller did not merely substitute his personal responsibility in place of the mortgage; that he did not become Carson's surety in the bond; but that he subjected himself to an immediate action in which the plaintiff may recover compensation for all she has lost and all she is likely to lose through his misconduct." (See *Walton v. Ruggles*, 180 Mass. 24, 61 N. E. Rep. 267; *Paro v. St. Martin*, 180 Mass. 29, 61 N. E. Rep. 268.)

"On a contract to pay money at stipulated periods there may be as many suits as there are instalments; for every failure to pay is a fresh breach of the contract, and there can be no recovery except for what is due at the time of suit brought. But on a *tort*, or on a duty or promise which has already been violated as grossly as it ever can be, there is but one action, and in that the injured party must have full justice. When, in the language of Chief Justice Best (2 Bing. 229), the thing has but one neck, and that is cut off by the act of the defendant, it would be mischievous to drive the plaintiff to a second,

third or fourth action as the successive consequences of the wrong may arise. It is not true, even as a general rule, that courts will not anticipate a loss *in futuro*. If a man destroys my orchard I may demand full reparation at once, and I am not compelled to sue every year for each crop of fruit I lose. In slander the damages are swelled by all the sufferings which the want of a good name may occasion subsequently. In an action for battery the plaintiff shall recover for all the injuries likely to result from the wounds inflicted by his adversary (1 *Ld. Raym.* 339). He who sues for the loss of an office or employment is entitled to a verdict at once for the whole value of it without waiting until the profits would have reached his pocket (2 Bing. 229). But we need not resort to analogies. A case directly in point is that of *Howell v. Young*, 5 B. & C. 259. There an attorney was employed to ascertain whether certain mortgages were a sufficient security for a loan of £3,000, and falsely informed his client that they were. It was held that in an action against the attorney the client might recover for all the probable loss he was likely to sustain from the invalidity of the security. The right of action in such cases accrues at the time when the contract or duty of the defendant is violated, and if suit be not brought within six years afterwards the statute of limitations is a flat bar, no matter when the consequential loss may have happened.

"The defendant has deprived the

took with the plaintiff to be surety for another if the [189] plaintiff would let to him a specified house at a rent stated, and would execute an agreement to that effect, but did not, it was held that the defendant's undertaking was entire, not to pay the rent as it became due from time to time, but to execute an obligation to do so, and that only one action could [190] be brought on his contract.<sup>1</sup>

plaintiff of what she relied on for a living; and this judgment is less than it ought to be if it does not place her in as good a condition, present and prospective, as he would have left her in by doing his duty. It is vain to say she has suffered no real loss. A debt worth to her \$1,800 has been converted into a thing of no value. The defendant found her in possession of what her frugal habits taught her to think sufficient; he left her 'as poor as winter.' If he had taken the sum out of her pocket in money, she must, according to his reasoning, suffer the extremity of the consequences before she has a right of action; and therefore she can bring no suit until she starves. But human nature will not endure such logic. The law is made for practical uses. It listens to no metaphysical subtleties; and will not consent on any terms to call that right which every sound heart feels to be wrong. The value of wealth, beyond what is barely necessary for the present hour, consists in the consciousness of having it, and the comfortable security it affords the possessor against future want. A cautious providence for the time of need, which may come hereafter, is one of the attributes which distinguish the race of man from the lower animals. The fear of becoming destitute is a sentiment as universal as it is necessary for the well-being of the world. When that fear is grounded on the absence of any accumulation which may serve

as a support, it is poverty,—a real, substantial, and sore evil, from which every well constituted person who feels will seek relief by the utmost exertion of mind and body. Here was a woman who consented to give up all she had in consideration that \$150 per annum for the term of her life should be secured to her beyond the reach of accidents by a mortgage. That mortgage was everything in the world that lay between her and the poor-house. By withholding it from the record the defendant left her to meet the adversities of life unarmed, naked, defenseless, and 'steeped in poverty to the very lips.' Her counsel would send her to Carson for support—to Carson who has no means of keeping the wolf from his own door. Why did they not tell her that she might possibly be fed and clothed by public charity? She must be made whole now or never—in this action or in none. That can be done by allowing her to recover all that the security she lost was worth—what a prudent person in her circumstances would be willing to give it up for—the difference in value between her debt made absolutely safe by a mortgage, and the same debt with no security except the personal responsibility of an insolvent man. How much is that? The court fairly and carefully put this question to the jury, and their verdict is the answer."

<sup>1</sup> Waterbury v. Graham, 4 Sandf. 215.

Where a personal injury is committed by a single tortious act, that act is a cause of action, and all the consequences for which compensation may be recovered are an entirety; recovery therefor may be had once for all in one action, and only in one, which may be brought any time after the act is committed.<sup>1</sup> So of any act done or default made which is a breach of any stipulation in a contract; it is a single and entire cause of action, embracing all ensuing consequences for which compensation is allowed; and however multifarious may be the stipulations in it any act which amounts to a total breach constitutes but a single cause of action;<sup>2</sup> unless perhaps where the stipulations are so distinct and relate to subjects so disconnected as to have no relation or unity but such as results from being made at the same time or contained in one instrument.<sup>3</sup> Nor can an entire claim be severed by partial assignments so as to become the foundation of several suits instead of one unless the debtor consents thereto.<sup>4</sup>

§ 114. **Damage to real property.** Actions for single and continuing nuisances and acts which are wrongful only when they result in damage may be successively brought; the damages recoverable are ordinarily confined to those which accrued prior to the time each action was begun.<sup>5</sup> In an action for

<sup>1</sup> *Bower v. The Water Witch*, 19 How. Pr. 241; *Curtis v. Rochester, etc. R. Co.*, 18 N. Y. 534; *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49; *Fetter v. Beale*, 1 Salk. 11; *Hochster v. De la Tour*, 2 El. & B. 678; *Miller v. Wilson*, 24 Pa. 114; *Veghte v. Hoagland*, 29 N. J. L. 125; *Thompson v. Ellsworth*, 39 Mich. 719; *Dailey v. Dismal Swamp C. Co.*, 2 Ired. 222; *Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505, 36 N. E. Rep. 381. See ch. 36.

<sup>2</sup> *Jacobs v. Davis*, 34 Md. 204; *Waterbury v. Graham*, 4 Sandf. 215; *Bancroft v. Winspear*, 44 Barb. 209; *Spear v. Stacy*, 26 Vt. 61.

<sup>3</sup> *McIntosh v. Lown*, 47 Barb. 550.

<sup>4</sup> *Chicago, etc. R. Co. v. Nichols*, 57 Ill. 464; *Fourth Nat. Bank v. Noonan*, 88 Mo. 372; *Loomis v. Robinson*,

76 id. 488; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312.

<sup>5</sup> *Blunt v. McCormick*, 3 Denio, 283; *Cumberland & O. Canal Co. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489; *Loweth v. Smith*, 12 M. & W. 582; *Beach v. Crain*, 2 N. Y. 86; *St. Louis, etc. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331, 6 L. R. A. 804; *Cobb v. Smith*, 38 Wis. 21; *Hazeltine v. Case*, 46 id. 301, 32 Am. Rep. 715; *Burnett v. Nicholson*, 86 N. C. 99; *McConnel v. Kibbe*, 29 Ill. 482, 33 id. 175, 85 Am. Dec. 265; *Holmes v. Wilson*, 10 A. & E. 503; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 25 Am. St. 545, 7 L. R. A. 451, 12 S. W. Rep. 937; *Illinois Central R. Co. v. Wilbourn*, 74 Miss. 284, 21 So. Rep. 1; *Lamm v. Chicago, etc. R. Co.*, 45 Minn. 71, 47 N. W. Rep. 455, 10 L. R. A. 268.

damages occasioned by flooding land a recovery was allowed for killing growing trees though they did not in fact die until after the action was commenced.<sup>1</sup> In an equity suit to obtain damages for acts done and to restrain their continuance, if a temporary injunction is disregarded a supplemental bill will lie to recover damages accruing after the bringing of the original bill.<sup>2</sup> In Minnesota the abatement of a nuisance and recovery of damages predicated thereon and incident thereto constitute but one cause of action; and where suit was brought to abate a nuisance the judgment therein barred a subsequent proceeding for damages based upon the same facts, notwithstanding the pleading in that case would not sustain an award of damages and none were recovered.<sup>3</sup>

Until recently it has been regarded as established by the English decisions that, where injuries to the land of one person result from digging, mining or building upon the property of another, all the damages, past and prospective, were recoverable in one suit brought upon the original cause of action.<sup>4</sup> Late adjudications have established another rule. In 1861 the house of lords passed upon a question based upon the following facts: A. B. was the owner of a house; C. D. was the owner of a mine under the house and under the surrounding land; C. D. worked the mine, and in so doing left insufficient support to the house, which was not damaged nor the enjoyment of it prejudiced until sometime after the workings had ceased. The question submitted by the lord chancellor to the lords was: "Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the working rendered the support insufficient?" The opinion was that the action was not barred if brought within six years from the time the mischief was done.<sup>5</sup> In an earlier case<sup>6</sup> an excavation had been made and a subsidence had resulted, the injury from which had been sat-

<sup>1</sup> *Hayden v. Albee*, 20 Minn. 159; *Clark v. Nevada Land & Mining Co.*, 6 Nev. 202; *Baltimore v. Merryman*, 86 Md. 584, 39 Atl. Rep. 98. See *Crabtree v. Hagenbaugh*, 25 Ill. 214, 76 Am. Dec. 793.

<sup>2</sup> *Waterman v. Buck*, 63 Vt. 544, 22 Atl. Rep. 15.

<sup>3</sup> *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. Rep. 767.

<sup>4</sup> *Mayne's Dam*. 138.

<sup>5</sup> *Backhouse v. Bonomi*, 9 H. of L. Cas. 503; *Bonomi v. Backhouse*, El. B. & E. 622, 654.

<sup>6</sup> *Nicklin v. Williams*, 10 Ex. 259 (1854).

ified. Subsequently another subsidence from the same excavation caused additional injury. In an action to recover for the latter the defense was that the cause of action in respect to the subsidence had been satisfied. The plaintiff pleaded that he was not suing for that cause of action, but for a new and different cause, the subsequent subsidence. The defendant contended that the pleading was bad because it was only a new assignment of damage which was the result of the former cause of action; with this contention the court agreed. In another case<sup>1</sup> the trustees of a turnpike road made a covered drain by the side of the highway; it was so made that it collected water in it, and the water was caused to flow into the plaintiff's mines, and could not go elsewhere. It was answered that the action was barred; but it appeared that the plaintiff had been injured within the time constituting the limitation. The court said the *causa causans* of the injury to the property was a continuing cause; but that cause alone gave to the mine-owner no right of action: it was a cause which if thereby any damage was occasioned to the mine-owner's property would immediately give him a cause of action; it had given him a cause of action sometime ago, but since that the trustees continued it; they might have stopped it; the continuing *causa causans* remained and remained in the power of the trustees, and that caused a new injury to the mine-owner's property, that was a new right of action because it was an injury to his property in each case. In a case<sup>2</sup> later than any referred to it was held by a majority of the court, Cockburn, C. J., dissenting, that, where land and buildings are injured by the removal of lateral support through mining operations carried on by the defendant on his own land, future damages are recoverable. Up to this point it seems clear that these cases are in conflict; Whitehouse v. Fellowes not being harmonizable with Nicklin v. Williams, and the latter being in antagonism with Backhouse v. Bonomi. This is the view of the court of appeal in a case decided in 1884,<sup>3</sup> and in which the conclusion of the dissenting member of the court in Lamb v. Walker was adopted

<sup>1</sup> Whitehouse v. Fellowes, 10 C. B. (N. S.) 765 (1861).

<sup>3</sup> Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125.

<sup>2</sup> Lamb v. Walker, 3 Q. B. Div. 389 (1878).



as a correct exposition of the law, and 'as being in harmony with the decision of the house of lords in *Backhouse v. Bonomi*. As stated by the master of the rolls in *Mitchell v. Darley Main Colliery Co.* the views of the chief justice in *Lamb v. Walker* were that where an excavation had been made and a subsidence had taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbor's property, and he knows that that neighbor is entitled to damages for it; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting in a wall or propping up his own property? There is nothing to prevent him; will he allow that to continue or will he not? If he does nothing, he is not counteracting the effects on his neighbor's property of something which he has done on his own; he is not counteracting that mischief to his neighbor by doing something on his own property; and if there is a new subsidence that will give his neighbor a new cause of action. It is difficult to conceive that the jury which is to give damages for the first subsidence that is existing ought to give damages for a prospective new subsidence which the defendant has the option and right to prevent; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given, the mine-owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. Expressing his own views, the master of the rolls continued: "That seems to me a proposition which, when it is well sifted out and examined, cannot stand, and therefore the chief justice's reasoning, of itself, and without reference to *Backhouse v. Bonomi*, is conclusive to show that each subsidence is a fresh cause of action. Besides that, it seems to me to be in accordance with what was decided in *Backhouse v. Bonomi*, and to be the logical result of *Backhouse v. Bonomi*. . . . Therefore, I agree with the lord chief justice's view that each subsidence is a new cause of action, although the *causa causans* of

each subsidence may be the same. It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation, the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combining of the excavation and of its remaining unremedied." A similar rule has been applied where the acts complained of were not continuous, as where temporary flash-boards were erected on a dam from time to time or the gates thereof were opened at intervals;<sup>1</sup> and where the water in a stream has been diverted by placing obstructions therein.<sup>2</sup> The cases in the state courts are generally in accord with the existing English doctrine.<sup>3</sup> In Pennsylvania the rule is otherwise.<sup>4</sup>

§ 115. Same subject. Where injuries result from a temporary trespass upon land all the damage done must be recovered for in a single action. If there has been a recovery for the injury inflicted upon a special part of a tract a subsequent action cannot be maintained to recover for that done to another portion of it at the same time and by the same act.<sup>5</sup>

<sup>1</sup> Noyes v. Stillman, 24 Conn. 15.

<sup>2</sup> Beckwith v. Griswold, 29 Barb. 294. See Williams v. Missouri Furnace Co., 13 Mo. App. 70.

<sup>3</sup> Smith v. Seattle, 18 Wash. 484, 51 Pac. Rep. 1057; St. Louis, etc. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. Rep. 331, 6 L. R. A. 804; Church of Holy Communion v. Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. Rep. 1030; Bank of Hartford County v. Waterman, 26 Conn. 324.

<sup>4</sup> Noonan v. Pardee, 200 Pa. 474, 50 Atl. Rep. 255, 55 L. R. A. 410, 86 Am. St. 722, approved in Guarantee Trust & Safe Deposit Co. v. Farmers' & Mechanics' Nat. Bank, 202 Pa. 94, 100, 51 Atl. Rep. 765. See Pantall v. Rochester & P. Coal & Iron Co., 18 Pa. Super. Ct. 341, 53 Atl. Rep. 751, — Pa. —, which is to the same effect.

<sup>5</sup> Pierro v. St. Paul, etc. R. Co., 39 Minn. 451, 40 N. W. Rep. 530, 12 Am. St. 673; Child v. Boston & F. L. Works, 19 Fed. Rep. 258; Williams v. Pomeroy Coal Co., 37 Ohio St. 583; Jack-

son v. Emmons, 19 D. C. App. Cas. 250; Dick v. Webster, 6 Wis. 481; Marshall v. Ulleswater Steam Nav. Co., L. R. 7 Q. B. 166; Lord Oakley v. Kensington Canal Co., 5 B. & Ald. 138; Clegg v. Dearden, 12 Q. B. 575; Vedder v. Vedder, 1 Denio, 257; Beronio v. Southern Pacific R. Co., 86 Cal. 415, 21 Am. St. 57, 24 Pac. Rep. 1093; Hoffman v. Mill Creek Coal Co., 16 Pa. Super. Ct. 631. See Pantall v. Rochester & P. Coal & Iron Co., 18 id. 341, — Pa. —, 53 Atl. Rep. 751.

Where damage was done to crops by animals which got access to them through a defective fence from June to December, a recovery for the whole damage alleged in one count was proper. Darby v. Missouri, etc. R. Co., 156 Mo. 391, 57 S. W. Rep. 550; Cook v. Redman, 45 Mo. App. 397.

A recovery by a cotenant for damage to land inclosed and used by him does not bar a subsequent action by another cotenant for damage

Where the trespass is continuing or is repeated each repetition or the continuation after suit brought is a fresh wrong and affords ground for a new action. So where the plaintiff was seized of an ancient house with lights therein, and the de-

done by the same act. *Gillum v. St. Louis, etc. R. Co.*, 4 Tex. Civ. App. 622, 23 S. W. Rep. 716.

In *Kansas Pacific R. Co. v. Muhlman*, 17 Kan. 224, *Brewer, J.*, discussed this question in an interesting way. It was there ruled that where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of the rights of B., a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass; the fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrong-doer and liable to repeated actions as long as the ditch remains unfilled; no one can be charged as a continuing wrong-doer who has not the right, and who is not under the duty, of terminating that which causes the injury; a party who has dug a ditch upon the land of another has no right to re-enter and fill it up; though unforeseen injury results from a completed act there does not arise a new cause of action for which a recovery may be had after the original wrong has been satisfied.

*Clegg v. Dearden*, 12 Q. B. 576, is interesting upon the same distinction. There the owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage. It was held that the party so excavating was liable in trespass for breaking into the neighboring mine,

but not in an action on the case for omitting to close up the aperture on his neighbor's soil, though a continuing damage resulted from its being unclosed. It was also held that a new action could not be maintained for damages occasioned by the flow of water in consequence of the aperture remaining unclosed after an action on the case had already been brought for making the aperture and letting in the water, which action was referred to arbitration, and the plaintiff being made a party to the reference in respect of any injury to him by any of the matters alleged in the declaration in such action, had had damages awarded and paid for such injury, although the damage last complained of was subsequent to the award and payment. *Lord Denman, C. J.*, said: "The gist of the action as stated in the declaration is the keeping open and unfilled of an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the boundary and within his mine. It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obli-

defendant erected a building whereby the former's lights were estopped, a recovery for the erection did not bar an action for its continuance.<sup>1</sup> In another case there had been an action of trespass for placing stumps and stakes on the plaintiff's land, which action had been satisfied; a subsequent action for leaving them there was sustained on the ground that a new trespass was thereby committed.<sup>2</sup> In *Holmes v. Wilson*<sup>3</sup> trespass was brought against a turnpike company for continuing buttresses on the plaintiff's land to support its road. He had recovered compensation in a former action. After refusing to remove the buttresses on request another action of trespass was brought. It was argued for the defendant that the damages given in the first action were to be regarded as full compensation for all injuries and were to be taken as the full estimated value of the land occupied by the buttresses; that the judgment operated as a purchase of the land. In reply Patterson, J., said: "How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action. If the property was changed when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by the defendant's buttresses, would the recovery of damages in trespass be a defense? There-

gation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable to an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation;

such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty." *Cumberland & O. Canal Co. v. Hitchings*, 65 Me. 140.

Successive actions lie for the unlawful diversion of water. *Irving v. Media*, 10 Pa. Super. Ct. 132, affirmed without opinion, 194 Pa. 648.

<sup>1</sup> *Rosewell v. Prior*, 2 Salk. 459.

<sup>2</sup> *Bowyer v. Cook*, 4 M. G. & S. 236. Compare *Kansas Pacific R. Co. v. Muhlman*, 17 Kan. 224.

<sup>3</sup> 10 A. & E. 503.

is no case to show that when land is vested in a party and fresh injuries are done upon it fresh actions will not lie." Where the defendant dug holes in and deepened the bed of a stream in order to increase its water supply, with the result that the water flowed more rapidly past the land of the plaintiff and was of less depth, so that such land was liable to be trespassed on by cattle, the plaintiff was entitled to bring successive actions for separate acts of trespass.<sup>1</sup> These cases may be distinguishable from the Kansas decision<sup>2</sup> on the ground that the request to remove the things complained of may be considered as a license to enter for that purpose; but otherwise it is difficult to harmonize them with it. It may be that the true ground of distinction is stated in a Maine case:<sup>3</sup> "When something has been unlawfully placed upon the land of another, which can and ought to be removed, then, inasmuch as successive actions may be maintained until the wrongdoer is compelled to remove it, the damages in such suit must be limited to the past and cannot embrace the future."

§ 116. **Same subject.** The authorities are not agreed as to the right to bring successive actions where the result of a tort to real property is to create a permanent appropriation of it to the public use, as for railroads, streets, sewers and the like; or to change its condition so as to adapt it to the grade of streets. Where property is taken for public use under the statutes which provide therefor prospective damages as well as others are assessed; they are an entirety, and all such as proceed from the appropriation of it to the use for which it is taken are presumed to have been anticipated.<sup>4</sup> If land is

<sup>1</sup> *Clarke v. Midland Great Western R. Co.*, [1895] 2 Irish, 294.

<sup>2</sup> *Kansas Pacific R. Co. v. Muhlman*, *supra*.

<sup>3</sup> *Cumberland & O. Canal Co. v. Hitchings*, 65 Me. 140.

<sup>4</sup> *White v. Chicago, etc. R. Co.*, 129 Ind. 317, 23 N. E. Rep. 782, 7 L. R. A. 257; *Perley v. B. & M. R. Co.*, 57 N. H. 212; *Sawyer v. Keene*, 47 id. 173; *Aldrich v. Cheshire R. Co.*, 21 id. 359, 53 Am. Dec. 212; *Fowle v. New Haven & N. Co.*, 107 Mass. 352, 112 id. 334, 17 Am. Rep. 106; *Van*

*Schoick v. Delaware Canal*, 20 N. J. L. 249; *Water Co. v. Chambers*, 13 N. J. Eq. 199; *Waterman v. Connecticut R. Co.*, 30 Vt. 610, 73 Am. Dec. 326; *Chesapeake Canal v. Grove*, 11 Gill & J. 398; *Furniss v. Hudson River R. Co.*, 5 Sandf. 551; *Baltimore R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310; *Missouri R. Co. v. Haines*, 10 Kan. 439; *La Fayette R. Co. v. New Albany*, 13 Ind. 90, 74 Am. Dec. 246; *Montmorency R. Co. v. Stockton*, 43 Ind. 328; *Evans v. Haefner*, 29 Mo. 141; *Baker v. Johnson*, 2 Hill, 342;

damaged by a permanent structure lawfully erected, which, without any further act except to keep it in repair, must continue to cause the result which is complained of, the owner may recover in one action for damages sustained and those which will fall upon him. The judgment in the action first brought will bar another like action for subsequent injuries from the same cause.<sup>1</sup> A recovery of prospective damages in such a case will bar an action for subsequent damages though caused by an unusual event.<sup>2</sup> In some cases this principle has been extended to the unlawful entry upon land by railroads and the building of tracks thereon,<sup>3</sup> and in others to the rightful improvement of a street, though the work was negligently done, and the negligence was the cause of the action.<sup>4</sup> These decisions are rested on the principle that the parties have elected to consider the trespass as permanent, and they apply the rule applicable in condemnation proceedings which requires a final adjustment of the liability of the party condemning.

*Call v. Middlesex*, 2 Gray, 232; *Veghte v. Hoagland*, 29 N. J. L. 125; *Galt v. Chicago, etc. R. Co.*, 157 Ill. 125, 140, 41 N. E. Rep. 643, citing the text. But see *Lancashire R. Co. v. Evans*, 15 Beav. 322.

It is said in *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. Rep. 821, that the construction of works of a public character by municipal officers is clearly analogous to the seizure of land under the right of eminent domain, and that all the damages occasioned thereby must be assessed in one action. But this position is controverted by a case considered in the text of this section.

<sup>1</sup> *Fowle v. New Haven & N. Co.*, 107 Mass. 352; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Same v. Schaffer*, 26 Ill. App. 280; *Same v. Loeb*, 118 Ill. 203, 8 N. E. Rep. 460; *Swantz v. Muller*, 27 Ill. App. 320; *Elizabethtown, etc. R. Co. v. Combs*, 10 Bush, 383, 19 Am. Rep. 67; *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush, 667; *North Vernon v. Voegler*, 103 Ind.

314, 2 N. E. Rep. 821; *Central Branch Union Pacific R. Co. v. Andrews*, 26 Kan. 702; *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 15 N. E. Rep. 279; *Bizer v. Ottumwa Hydraulic Co.*, 70 Iowa, 145, 30 N. W. Rep. 172; *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Indiana, etc. R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225, 11 N. E. Rep. 467; *Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. Rep. 1; *Frankle v. Jackson*, 33 Fed. Rep. 371.

<sup>2</sup> *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106.

<sup>3</sup> *Chesapeake & O. R. Co. v. Moats*, 20 Ky. L. Rep. 1757, 50 S. W. Rep. 31; *International, etc. R. Co. v. Gieselman*, 12 Tex. Civ. App. 123, 34 S. W. Rep. 658; *Frankle v. Jackson*, 33 Fed. Rep. 371; *Central Branch Union Pacific R. Co. v. Andrews*, 26 Kan. 702; *Indiana, etc. R. Co. v. Eberle*, *supra*; *Baldwin v. Chicago, etc. R. Co.*, 35 Minn. 354, 29 N. W. Rep. 5.

<sup>4</sup> *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. Rep. 821; *Powers v. Council Bluffs*, *supra*.

As will appear there are strong objections and weighty authorities in opposition. Some of the courts which entertain this view hold that if the gist of the complaint is not the unlawful entry and occupation, but the improper use, that the wrong may be redressed in successive actions.<sup>1</sup>

For damages resulting from the negligent erection or construction of a building or culvert which is erected or constructed pursuant to law, successive actions may be brought.<sup>2</sup> Damage to crops by the annual overflow of water is susceptible of apportionment, and compensation therefor may be recovered in successive actions.<sup>3</sup> In a New York case, which was fully considered,<sup>4</sup> it is held that, if a railroad is constructed upon or over a highway in which or in the soil of which individuals have private rights, unless the public right is obtained and private rights are lawfully acquired the builders thereof are trespassers; and an adjacent owner may recover only the damages he has sustained up to the commencement of the action; for damages thereafter resulting successive actions may be brought.<sup>5</sup> There is no presumption that the trespass will be continued, and title to land cannot be acquired otherwise than by purchase or condemnation proceedings.<sup>6</sup> Criticising the rule held by some courts to the effect that where the character of the injury is permanent, and the complaint recognizes the defendant's right to continue in the use of the property, and to acquire as the result of the suit the owner's right thereto, in pursuance of which the damages are assessed on the basis of the permanent depreciation of the property, and with special reference to a case which holds that damages may be so assessed

<sup>1</sup> *Lindquest v. Union Pacific R. Co.*, 33 Fed. Rep. 372.

<sup>2</sup> *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 15 N. E. Rep. 279; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 280, 124 Ill. 112, 16 N. E. Rep. 239.

<sup>3</sup> *Oldfield v. Wabash, etc. R. Co.*, 22 Mo. App. 607; *Van Hoozier v. Hannibal, etc. R. Co.*, 70 Mo. 145; *Dickson v. Chicago, etc. R. Co.*, 71 id. 575.

<sup>4</sup> *Uline v. New York, etc. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. Rep. 536.

<sup>5</sup> This rule is well established in

New York. *New York Nat. Bank v. Metropolitan E. R. Co.*, 108 N. Y. 660, 15 N. E. Rep. 445; *Pond v. Same*, 112 N. Y. 186, 8 Am. St. 734, 19 N. E. Rep. 487. See *Lahr v. Same*, 104 N. Y. 270, 10 N. E. Rep. 528; *Henderson v. New York Central R. Co.*, 78 N. Y. 423; *Schell v. Plumb*, 55 id. 592.

<sup>6</sup> *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625, 1 N. W. Rep. 295; *Blesch v. Chicago, etc. R. Co.*, 43 Wis. 183; *Russell v. Brown*, 63 Me. 203; *Cumberland & O. Canal Co. v. Hitchings*, 65 id. 140.

for negligence in making a lawful improvement in a street,<sup>1</sup> Earl, J., says that in his opinion that decision is clearly unsound as to the precise question adjudged. "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue?" The municipality "may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to its embankment, and this it may do after its carelessness and unskilfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before, they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated."<sup>2</sup> In Pennsylvania if the damage from the taking and

<sup>1</sup> North Vernon v. Voegler, 103 Ind. 314, 2 N. E. Rep. 821.

<sup>2</sup> The writer of the opinion cited Rosewell v. Prior, 2 Salk, 460; Bowyer v. Cook, 4 M. & S. 236; Holmes v. Wilson, 10 A. & E. 503; Thompson v. Gibson, 8 M. & W. 281; Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Esty v. Baker, 48 Me. 495; Russell v. Brown, 63 id. 203; Cumberland & O. Canal Co. v. Hitchings, 65 id. 140; Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Thompson v.

Morris Canal & B. Co., 17 N. J. L. 480; Thayer v. Brooks, 17 Ohio, 489; Anderson, etc. R. Co. v. Kernodle, 54 Ind. 314; Harrington v. St. Paul, etc. R. Co., 17 Minn. 215; Adams v. Hastings & D. R. Co., 18 id. 260; Ford v. Chicago & N. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Carl v. Sheboygan, etc. R. Co., 46 Wis. 625, 1 N. W. Rep. 295; Blesch v. Chicago & N. R. Co., 43 Wis. 183; Green v. New York, etc. R. Co., 65 How. Pr. 154; Taylor v. Metropolitan E. R. Co., 50 N. Y. Super. Ct. 311; Duryea v. Mayor, etc.,



from the change of grade arises at the same time the compensation awarded or recovered for the taking embraces the damages resulting from the change of grade,<sup>1</sup> but if the latter is made subsequent to the taking an action to recover the damages done thereby will lie.<sup>2</sup>

§ 117. **Contracts of indemnity.** Upon contracts of indemnity, if there has been a breach before suit brought, any actual damage subsequently resulting therefrom, or payments made by the indemnified party covered by the agreement after as well as before the commencement of suit and down to the time of the trial, may be included in the recovery.<sup>3</sup> So [191] if the defendant's breach of any contract or his wrongful act has involved the injured party in a legal liability to pay money, or he has incurred indebtedness to a third person, or expenses to relieve against the effects of the act which constitutes the cause of action, such liability, indebtedness or expenses, paid or not, constitutes an element of damage without regard to the time when it was actually incurred or discharged.<sup>4</sup>

§ 118. **Damage to property and injury to person by same act.** The question has arisen whether damage inflicted upon property and injury resulting to the person from one act of negligence will give cause for independent actions. Through the negligence of the defendant's servant the plaintiff's cab was damaged and his person injured. An action to recover for the damage done to the cab was successful. Subsequently an action to recover for the personal injuries was instituted. It was held that inasmuch as the damages therefor might have been claimed in the other action, the judgment recovered in it barred the second suit.<sup>5</sup> It was considered that there was but one wrong though there were two consequences. The court of appeal reversed this judgment, Coleridge, C. J., dissenting. The majority of the court were of the opinion that

26 Hun, 120, and other cases in New York.

<sup>1</sup> *Righter v. Philadelphia*, 161 Pa. 73, 28 Atl. Rep. 1015.

<sup>2</sup> *Clark v. Philadelphia*, 171 Pa. 80, 33 Atl. Rep. 124, 50 Am. St. 790; *Rodgers v. Philadelphia*, 181 Pa. 243, 37 Atl. Rep. 339.

<sup>3</sup> *Spear v. Stacy*, 26 Vt. 61.

<sup>4</sup> *Id.*; *Dixon v. Bell*, 1 Stark. 287; *Hagan v. Riley*, 13 Gray, 515; *Smith v. Howell*, 6 Ex. 730; *Kenyon v. Woodruff*, 33 Mich. 310.

<sup>5</sup> *Brunsdon v. Humphrey*, 11 Q. B. Div. 712 (1883), per Pollock, B., and Lopes, J.

"two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action in *one* sense may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action."<sup>1</sup> This distinction impresses the writer as being too metaphysical for practical purposes, and as out of harmony with the analogies of the law. Our assent is compelled to the opposite view by the reason given by the chief justice in his dissenting opinion: "It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i. e., his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if besides his arm and leg being injured his trousers which contains his leg and his coat sleeve which contains his arm have been torn." The rule which prevails in the state courts generally is in harmony with the views of the dissenting opinion quoted from.<sup>2</sup> In New York, however, the English doctrine

<sup>1</sup> Id.; 14 Q. B. Div. 141 (1884). See *Rose v. Buckett*, [1901] 2 K. B. 449.

<sup>2</sup> *Pittsburgh, etc. R. Co. v. Carlson*, 24 Ind. App. 559, 566, 56 N. E. Rep. 251; *Wesley v. Chicago, etc. R. Co.*, 84 Iowa, 441, 51 N. W. Rep. 163; *Owensboro & H. Gravel Road Co. v. Coons*, 20 Ky. L. Rep. 1678, 49 S. W. Rep. 966; *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. Rep. 966; *Bliss v. New York Central, etc. R. Co.*, 160 Mass. 447, 455, 36 N. E. Rep. 65; *Nok-*

*ken v. Avery Manuf. Co.*, — N. D. —, 92 N. W. Rep. 487; *Von Fragstein v. Windler*, 2 Mo. App. 598; *Lamb v. St. Louis, etc. R. Co.*, 33 id. 489.

Under the California code, which is to the effect that the plaintiff may unite several causes of action in the same complaint when they all arise out of injuries to character, injuries to person, injuries to property, a complaint seeking a recovery for damages to property,

is favored. The ground upon which the court of appeals rested its ruling is that there is such an essential difference between an injury to the person and an injury to property that makes it impracticable, or, at least, very inconvenient in the administration of justice to blend the two. Different periods of limitation apply, and the law governing the assignment of the two causes of action varies.<sup>1</sup> One of the Texas courts of civil appeals also favors the English rule.<sup>2</sup>

§ 119. **What is not a double remedy.** In an attachment in equity against B. and A. the property of A. was taken as the property of B., and, being perishable, was sold under an order of the court, and afterwards the court decreed that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A. moved against him and his sureties, and judgment was entered for the penalty of his bond, to be discharged by the payment of the proceeds, which they paid. Previous to the decision of the court in favor of A. he brought an action on the bond of the sheriff, against him and his sureties, for the trespass in taking his goods; the former judgment and [192] its payment were set up in defense but it was held that the action was not thereby barred, but A. might recover the difference between the value of the goods at the time they were taken under the attachment and the amount of the proceeds of sale paid him.<sup>3</sup> If the master of a whaling vessel [193] abandons the voyage and wrongfully sells the property of the owner on board, the subsequent collection of a part of the proceeds of such sale is no bar to an action against him for breaking up the voyage and disposing of the property, but it reduces the damage.<sup>4</sup> One whose goods were maliciously attached upon a writ against a third party and who recovered judgment in replevin against the attaching officer was not thereby barred of his action against the original plaintiff for wrongfully directing the levy. The original attachment was,

injury to character and impairment of health is bad. *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. Rep. 56.

<sup>1</sup> *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. Rep. 772, 88 Am. St. 636.

<sup>2</sup> *Watson v. Texas & P. R. Co.*, 8

*Texas Civ. App.* 144, 27 S. W. Rep. 924. See *Stickford v. St. Louis*, 7 Mo. App. 317.

<sup>3</sup> *Sangster v. Commonwealth*, 17 Gratt. 124.

<sup>4</sup> *Brown v. Smith*, 12 Cush. 366.

on the part of the present defendant, a malicious abuse of legal process. Against the officer no malice or improper motive was charged. He could therefore be held to answer in damages only to the extent required to compensate the plaintiff in replevin for the actual pecuniary loss necessarily involved. The plaintiff in the attachment, on the other hand, may be liable for consequential, and, perhaps, for vindictive, damages. The causes of action were different and distinct.<sup>1</sup>

**§ 120. Prospective damages.** In the application of the rule that all the damages which pertain to a cause of action, without reference to the time when they actually accrue, are entire and cannot be recovered piecemeal by successive actions, it is frequently necessary to take into consideration damages which have not been actually suffered either at the commencement of the suit or its trial; for otherwise there would be a [194] very inconvenient postponement of that class of actions or a renunciation of a large part of the compensation due to the injured party. When a cause of action accrues there is a right, as of that date, to all the consequent damages which will ever ensue.<sup>2</sup> They are recoverable in one action if they can be proved, and only one can be maintained; it may be brought at any time after the accrual of the right. The question is a practical and legal one in each case whether the cause of action is of such a nature that the injurious consequences of the wrong complained of can reach into the future or whether any subsequent damages will be owing to a continuous fault which may be the foundation of a new action. So is the question whether any offered evidence tends to prove future damages which are the legal result of the wrong which constitutes the cause of action, and whether the sum of the evidence in

<sup>1</sup> *Vincent v. McNamara*, 70 Conn. 332, 39 Atl. Rep. 444.

<sup>2</sup> *Empie v. Empie*, 35 App. Div. 51, 54 N. Y. Supp. 402; *Morrison v. McAttee*, 23 Ore. 530, 32 Pac. Rep. 400; *Fales v. Hemenway*, 64 Me. 373; *Paige v. Barrett*, 151 Mass. 67, 23 N. E. Rep. 725; *Cook v. Redman*, 45 Mo. App. 397, citing the text; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105, 46 N. W. Rep. 314; *Bowe v. Minnesota*

*Milk Co.*, 47 Minn. 460, 46 N. W. Rep. 142; *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451; *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132, 25 N. E. Rep. 208; *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510, 60 N. E. Rep. 772, 82 Am. St. 731; *Armerman v. Deane*, 132 N. Y. 355, 30 N. E. Rep. 741. See *Drummond v. Crane*, 159 Mass. 577, 35 N. E. Rep. 90, 38 Am. St. 460, 23 L. R. A. 707.

the particular case is sufficient for the consideration of the jury.

If a growing crop is destroyed it can, of course, never be shown with absolute certainty that but for its destruction it would have matured; nor that one party who is stopped by the other in the performance of a special contract would otherwise have proceeded to a complete execution of it so as to entitle himself to its full benefits. Nor is it matter of law that the jury shall assume that the crop would have matured, or that the contract would have been fulfilled. The jury may estimate, with the aid of testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or appreciation;<sup>1</sup> and so of the increase of a flock of sheep and the growth of the wool thereof.<sup>2</sup> The same uncertainties and a greater surface of them are encountered in actions upon warranties that seeds sold for planting are of particular varieties.<sup>3</sup>

In actions upon contracts which contemplate a series [195] of acts and a considerable period of time for performance a party complaining of a total breach by the other sufficiently maintains his right to recover if he has performed without default up to the time of the breach and is ready to proceed, though his right to the value of the contract depends on his ability and inclination to prosecute the performance on his part to completion. He is entitled to recover the profits which

<sup>1</sup> Shoemaker v. Acker, 116 Cal. 239, 48 Pac. Rep. 62, citing the text; Shoemaker v. Crawford, 82 Mo. App. 487; Railway Co. v. Yarrowborough, 56 Ark. 612, 619, 20 S. W. Rep. 515, quoting the text; Railway Co. v. Lyman, 57 Ark. 512, 22 S. W. Rep. 170; Taylor v. Bradley, 39 N. Y. 129; People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 6 N. W. Rep. 636; Smith v. Chicago, etc. R. Co., 38 Iowa, 518; Richardson v. Northrup, 66 Barb. 85; Folsom v. Apple River Log Driving Co., 41 Wis. 602; Texas Pacific R. Co. v. Bayliss,

62 Tex. 570; Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280.

<sup>2</sup> Schrandt v. Young, 89 N. W. Rep. 607 (Neb.), citing the text; Rule v. McGregor, — Iowa, —, 90 N. W. Rep. 811.

<sup>3</sup> Randall v. Raper, El. B. & E. 84; Passinger v. Thorburn, 34 N. Y. 634; White v. Miller, 7 Hun, 427, 71 N. Y. 118, 27 Am. Rep. 13; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; Ferris v. Comstock, 33 Conn. 513.

he would have made,—the contract price less what he would have to do or expend to earn or otherwise entitle himself to it. This deduction may be the price of labor or the value of property at a future day. The action for damages recoverable for such a breach may be brought and tried before that day arrives. If so, the prices prevailing at the time of the breach may be acted upon as the test of values at the times mentioned in the contract;<sup>1</sup> but if the trial be delayed until the date fixed for performance the parties may show the prices actually prevailing then or any other conditions, favorable or otherwise, affecting the cost of fulfilling the contract.<sup>2</sup>

§ 121. **Certainty of proof of future damages.** The conservatism pervading the law is opposed to allowing compensation for probable loss. It manifests itself more particularly in respect to those damages which might be proved with certainty if they were real; and, if not fanciful and imaginary, are past damages: not such as are contemplated to arise in the future from such causes as, according to general experience, produce them. The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur; the jury may proceed upon reasonable probabilities, and accept as sufficiently proved those results which, under like circumstances, generally come to pass.<sup>3</sup> It is [196] not, however, to be hence inferred that prospective dam-

<sup>1</sup> *Masterton v. Mayor*, 7 Hill, 61.

<sup>2</sup> *Burrell v. New York & S. Solar Salt Co.*, 14 Mich. 34; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, 6 N. W. Rep. 636; *Chicago v. Greer*, 9 Wall. 726; *Hochster v. De la Tour*, 2 El. & B. 678; *Frost v. Knight*, L. R. 5 Ex. 322, 7 id. 111; *Taylor v. Bradley*, 39 N. Y. 129; *Howard v. Daly*, 61 id. 362, 19 Am. Rep. 285; *Richmond v. Dubuque, etc. R. Co.*, 40 Iowa, 264; *Jacobs v. Davis*, 34 Md. 204; *Grover v. Buck*, 34 Mich. 519; *Shoemaker v. Acker*, *supra*.

<sup>3</sup> *James v. Kibler*, 94 Va. 165, 26 S. E. Rep. 417, citing the text; *Treat v. Hiles*, 81 Wis. 278, 50 N. W. Rep. 896; *Lewis v. Atlas Mut. L. Ins. Co.*, 61

Mo. 534 (disapproved in *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. Rep. 502, 43 C. C. A. 669); *Howell v. Young*, 5 B. & C. 259; *Macrae v. Clarke*, L. R. 1 C. P. 403; *Frye v. Maine Central R. Co.*, 67 Me. 414; *Richmond v. Dubuque, etc. R. Co.*, 40 Iowa, 264; *Schell v. Plumb*, 55 N. Y. 592; *Missouri, etc. R. Co. v. Fort Scott*, 15 Kan. 435; *Roper v. Johnson*, L. R. 8 C. P. 167; *Peltz v. Eichele*, 62 Mo. 171; *Sutherland v. Wyer*, 67 Me. 65; *Gifford v. Waters*, 67 N. Y. 80; *Richardson v. Mellish*, 2 Bing. 229; *Wilson v. Northampton, etc. R. Co.*, L. R. 9 Ch. 279, quoted from in § 590. See ch. 36.

ages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events; it is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration. The price of an average colt cannot be fixed by deducting the cost of its keep from the value of an average horse, for there is not a certainty of exemption from accidents and disease. All the damages from a single tortious act are an entirety, and must be assessed and recovered once for all.<sup>1</sup> Successive actions cannot be maintained for their recovery as they may accrue from time to time. The injured party is entitled to recover in one action compensation for all the damages resulting from the injury, whether present or prospective. And in respect to the latter, the rule is that he can recover for such as it is shown with reasonable certainty will result from the wrongful act complained of.<sup>2</sup>

**§ 122. Action for enticing away apprentice, servant or son.** In an action for enticing away an apprentice damages cannot include the loss of his services for the residue of his term, for he may return.<sup>3</sup> Where an action on the case was brought to recover for the defendant's enticement of the plaintiff's minor son from his service and inducing him to enlist in the army for three years, it was held that the plaintiff could only recover damages for the loss of service up to [197] the time of the commencement of the action, or at most up to the time of trial.<sup>4</sup>

<sup>1</sup> § 120; *Galligan v. Sun Printing & Publishing Ass'n*, 25 N. Y. Misc. 355, 54 N. Y. Supp. 471.

<sup>2</sup> *Filer v. New York Central R. Co.*, 49 N. Y. 42; *Miller v. Wilson*, 24 Pa. 114; *Fetter v. Beale*, 1 Salk. 11; *Hodsoll v. Stallebrass*, 11 A. & E. 301; *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259; *Ingraham v. Lawson*, 8 Scott, 471; *Clegg v. Dearden*, 12 Q. B. 576; *Stroyan v. Knowles*, 6 H. & N. 454; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. Rep. 631; *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. Rep. 783, citing

pp. 187, 193-198 of the text of the 1st ed.; *Grotenkemper v. Harris*, 25 Ohio St. 514; *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 352, 42 Pac. Rep. 860, 43 id. 713, citing the text. See § 1251.

<sup>3</sup> *Fay v. Guynon*, 131 Mass. 31; *Hambleton v. Veere*, 2 Saund. 170; *Moore v. Love*, 3 Jones, 215; *Hodsoll v. Stallebrass*, 11 A. & E. 301; *Trigg v. Northcut*, Litt. Sel. Cas. 414; *Lewis v. Peachey*, 1 H. & C. 518; *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49. See *McKay v. Bryson*, 5 Ired. 216.

<sup>4</sup> *Covert v. Gray*, 34 How. Pr. 450.

§ 123. **Future damages for personal injuries.** In ascertaining the amount of damages resulting from a personal injury the jury may consider the bodily pain and mental suffering which have occurred and are likely to occur in the future

In this case there were numerous contingencies with elements of probability in each: the enlisted man might be discharged by reason of sickness or wounds; his enlistment being illegal, it was the duty of the war department to discharge him; there was no presumption that the war would continue for three years.

In *Moore v. Love*, 3 Jones, 215, Battle, J., thus discusses the distinction between cases where the cause of action is an entirety and those which admit of a succession of suits: "It is clearly stated by Lord Mansfield, in the case of *Robinson v. Bland*, 2 Burr. 1077, 'When a new action may be brought and satisfaction obtained thereupon for any duties or demands which may have arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment upon the former action. As in covenant for the non-payment of rent, or of an annuity payable at different times, you may bring a new action *toties quoties* as often as the respective sums become due and payable. So in trespass and in tort, new actions may be brought as often as new injuries and wrongs are repeated; and therefore damages shall be assessed only up to the time of the wrong complained of. But where a man brings an action of *assumpsit* for principal and interest upon a contract obliging the defendant to pay such principal money, with interest from such a time, he complains of the non-payment of both; the interest is an accessory to the principal, and he cannot bring a new action for any interest grown due between

the commencement of his action and the judgment in it.' What is here so well said about the interest being the accessory to the principal money, and therefore recoverable down to the time of the trial, applies with equal force to the case of trespass and tort where the wrong done is not repeated or continued, though the damage resulting from it may not cease being developed until after the time when the writ was issued. In the latter case the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damages which can then be estimated as reasonably certain to occur.

"This brings us to the consideration of the case of *McKay v. Bryson*, 5 Ired. 216, which may seem at first view to militate against the distinction by which we have endeavored to reconcile the decisions which have been made upon the subject of prospective damages. It was an action on the case brought to recover damages for enticing the plaintiff's apprentice from his service *and conveying him out of the state*." The testimony showed that the boy was bound apprentice to learn the business of a tailor, and that he continued in the service of his master until he was carried away by the defendant, and when last heard from he was in Tennessee. The suit was brought some time before the expiration of the term of service, and the jury were instructed that they might give damages as for a total loss of service during the whole period of appren-



in consequence thereof, as well as the loss of time, expense [198] of medical and other attendance and the diminution of ability to earn money.<sup>1</sup> The inquiry cannot be extended to cover the merely possible consequences of the injury, as by the possible

ticeship, subject to a deduction on account of the plaintiff's chance of regaining the boy. The charge given to the jury in the court below was approved in this court upon the authority of the case of *Hodsoll v. Stallebrass*, 11 A. & E. 301. No other case appears to have been cited and the court do not advert to the fact that in *Hodsoll v. Stallebrass* the injury from which the loss accrued to the plaintiff was a single act of wrong; but they do advert to and state the fact that the loss caused by the tort of the defendant was in effect a total loss of the plaintiff's apprentice. The only wrong alleged in the declaration or proved on the trial was that of carrying the apprentice beyond the limits of the state, which caused a total loss of his services to his master. In this view the case may well be sustained upon the principle applicable to the second class of cases to which we have referred. That the removal of the apprentice out of the state may be regarded in the same light as if a permanent injury had been inflicted upon him, we have the strong analogy of the case of trover by one tenant in common against another for the destruction of the article held in common. If the article be sent off by the defendant to a place unknown to the plaintiff, so that, as to him, it is totally lost, it is equivalent to its destruction. *Lucas v. Wasson*, 3 Dev. 398, 24 Am. Dec. 266. The circumstances of the present case are very different from those in *McKay v. Bryson*. The apprentices were carried by the defendant to his residence in an adjoining county, only twenty-five miles distant from the plaintiff. They were not con-

cealed from him; and it appears from the proof that he knew where they were. The continued detention of them by the defendant was a succession of torts for which he might bring new actions from time to time; and hence his case falls into the class with *Hambleton v. Veere*, and all those on which damages can be given for the loss of service up to the commencement of the suit only."

The true distinction is undoubtedly pointed out in the foregoing opinion, that the damages in an action cannot include those arising after suit is brought if a new action could be brought for them; but it may admit of a doubt if the case was properly disposed of upon that test. A trespasser who takes personal property and retains it may be said to commit a succession of torts while he retains the property; but in an action for such a taking the injured party would undoubtedly be obliged to make his full claim of damages. He would not be entitled to a succession of actions. In cases where apprentices have been enticed away, and the enticer has not, by the injury or otherwise, made it reasonably certain that the apprentice will not return, prospective damages are not denied because a new action may be brought for them but because they are not susceptible of proof; they are not certain. But if the defendant has control, and will have it in the future, he may be charged with depriving the master of the services of an apprentice for the whole term for the same reason that he might be charged with the full value of a horse tortiously taken. See *Herriter v. Porter*, 23 Cal. 385.

<sup>1</sup> *Swift v. Raleigh*, 54 Ill. App. 44;

outbreak of a new disease or other sufferings having their cause in the original wrong done the plaintiff; in such a case there is a double speculation — one that the result may possibly occur, and the other that if it does it will be a product of the original injury instead of some other new and, perhaps, unknown cause.<sup>1</sup>

§ 124. **Only present worth of future damages given.** An award on account of prospective damages is like payment in advance, and in fixing the same that fact may be taken into consideration and the amount may properly be reduced to its present worth.<sup>2</sup>

§ 125. **Continuous breach of contracts or infraction of rights not an entirety.** A continuous breach of contract or infraction of a right is not an entirety. It is at any time severable for the purpose of redress in damages for the injury already suffered. This is the case whenever a continuous duty imposed by law or by contract is uninterruptedly neglected, whether such departure from the line of duty be by positive acts or by culpable inaction.<sup>3</sup> There is a legal obligation to

Griswold v. New York Central, etc. R. Co., 115 N. Y. 61, 12 Am. St. 775, 21 N. E. Rep. 726; Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 353, 42 Pac. Rep. 860, 43 id. 713, citing the text; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254, 53 N. E. Rep. 22; Denver Consolidated Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. Rep. 476; Bay Shore R. Co. v. Harris, 67 Ala. 6; Curtiss v. Rochester, etc. R. Co., 20 Barb. 282; Atchison v. King, 9 Kan. 550; Welch v. Ware, 32 Mich. 77; Birchard v. Booth, 4 Wis. 67; Morely v. Dunbar, 24 Wis. 183; Wilson v. Young, 31 Wis. 574; Goodno v. Oshkosh, 28 Wis. 300; Spicer v. Chicago, etc. R. Co., 29 Wis. 580; Karasich v. Hasbrouck, 28 Wis. 569; Pennsylvania R. Co. v. Dale, 76 Pa. 47; Tomlinson v. Derby, 43 Conn. 562; Fulsome v. Concord, 46 Vt. 135; Nones v. Northouse, id. 587; Metcalf v. Baker, 56 N. Y. 662; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Walker v. Erie R. Co., 63 Barb. 260; Bradshaw v. Lan-

cashire R. Co., L. R. 10 C. P. 189; Collins v. Council Bluffs, 32 Iowa, 324; Russ v. Steamboat War Eagle, 14 Iowa, 363; Dixon v. Bell, 1 Stark. 287; McLain v. St. Louis & S. R. Co., — Mo. App. —, 73 S. W. Rep. 909, 912, citing the text. See ch. 36.

<sup>1</sup> Strohm v. New York, etc. R. Co., 96 N. Y. 305; Toser v. New York Central, etc. R. Co., 105 N. Y. 659, 11 N. E. Rep. 369; Turner v. Newburgh, 109 N. Y. 301, 16 N. E. Rep. 344; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254, 53 N. E. Rep. 22.

<sup>2</sup> Pickett v. Wilmington & W. R. Co., 117 N. C. 616, 23 S. E. Rep. 264, 53 Am. St. 611, 30 L. R. A. 257; Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 35 Atl. Rep. 191, 50 Am. St. 787; Morrissey v. Hughes, 65 Vt. 553, 27 Atl. Rep. 205; Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 84 Fed. Rep. 772; Morrison v. McAtee, 23 Ore. 530, 32 Pac. Rep. 400; Fulsome v. Concord, 46 Vt. 135. See §§ 1251, 1265.

<sup>3</sup> Lake Shore, etc. R. Co. v. Richards, 152 Ill. 59, 38 N. E. Rep. 773, 30

discontinue a trespass or to remove a nuisance.<sup>1</sup> So a covenant to keep certain premises in repair for a specified period imposes a continuous duty, and when neglected gives a continuous cause of action.<sup>2</sup> When an action is brought the injury to that time is segregated and the recovery is confined to such damages as result from the breach or wrong continued to the commencement of the action.<sup>3</sup>

### § 126. Continuance of wrong not presumed. [199-201]

The law will not presume the continuance of a wrong, nor allow a license to continue it, or a transfer of title to result from the recovery of damages for prospective misconduct.<sup>4</sup> But in equity the owner of real property upon which a trespass has been committed may restrain the continuance of the wrong and thus prevent a multiplicity of actions at law to recover damages. In such an action the court may determine the amount of damages the owner would sustain if the trespass were permanently continued, and decree that upon their payment the plaintiff shall give a deed or convey the right to the defendant.<sup>5</sup>

L. R. A. 33; Van Keuren v. Miller, 78 Hun, 173, 28 N. Y. Supp. 971; Connolly v. Coon, 23 Ont. App. 37; Powers v. Ware, 4 Pick. 106; Pierce v. Woodward, 6 Pick. 206; McConnell v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265. See Drummond v. Crane, 159 Mass. 577, 35 N. E. Rep. 90, 38 Am. St. 460, 23 L. R. A. 707; Wilson v. Sullivan, 17 Utah, 341, 53 Pac. Rep. 994.

<sup>1</sup> Per Lord Denman in Clegg v. Dearden, 12 Q. B. 601; Savannah, etc. R. Co. v. Davis, 25 Fla. 917, 7 So. Rep. 29; Adams v. Hastings & D. R. Co., 18 Minn. 260.

<sup>2</sup> Cooke v. England, 27 Md. 14; Beach v. Crain, 2 N. Y. 86; Bleecker v. Smith, 13 Wend. 530; Phelps v. New Haven, etc. Co., 43 Conn. 453; Keith v. Hinkston, 9 Bush, 283.

<sup>3</sup> Id.; Sackrider v. Beers, 10 Johns. 241; Shaw v. Etheridge, 3 Jones, 301; Brasfield v. Lee, 1 Ld. Raym. 329; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Mahon v. New York Central R. Co., 24 N. Y. 658; Phillips v. Terry,

3 Keyes, 313; Hayden v. Albee, 20 Minn. 159; Thompson v. Gibson, 7 M. & W. 456; Beckwith v. Griswold, 29 Barb. 291; Bradley v. Amis, 2 Hayw. 390; Caruthers v. Tillman, 1 id. 501; Duncan v. Markley, Harp. 276; Moore v. Love, 3 Jones, 215; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; Hudson v. Nicholson, 5 M. & W. 437.

<sup>4</sup> Adams v. Hastings & D. R. Co., 18 Minn. 260; Ford v. Chicago, etc. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Uline v. New York, etc. R. Co., 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. Rep. 536; Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378; Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279; Whitmore v. Bischoff, 5 Hun, 176; Sherman v. Milwaukee, etc. R. Co., 40 Wis. 645; Russell v. Brown, 63 Me. 203; Bowyer v. Cook, 4 C. B. 236; Holmes v. Wilson, 10 A. & E. 503; Battishill v. Reed, 18 C. B. 696; Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140.

<sup>5</sup> Pappenheim v. Metropolitan E.

[202] § 127. **Necessity of successive actions.** The necessity and advantage of successive actions to recover damages which proceed from a continuous and still operating cause are very obvious; for, besides the considerations which have already been mentioned, the injurious effects so blend together that in most instances it would be wholly impracticable to accurately apportion them. Therefore, the right to recover for all damages which have been suffered to the time of bringing the first action, in the next, all damages which have been suffered from that time to that of commencing such second action, and so on while the cause continues, is the most convenient course for practical redress that can be devised.<sup>1</sup> In cases of contracts imposing a continuous duty, or a duty the continued neglect of which is an uninterrupted breach, from which results a steady accretion of damage, the injured party may bring a succession of actions or treat defaults having that significance as a total breach,<sup>2</sup> and recover damages accordingly. Of this nature was the contract in *Crain v. Beach*,<sup>3</sup> where the plaintiff had granted to the defendants a perpetual right of way over his land and covenanted to erect a gate of a specified description at the terminus, to which the defendants covenanted in the same instrument to make all necessary re-

[203] pairs. The plaintiff erected the gate, which was subsequently removed by some unknown person. It was held that the defendants were bound to replace it; the covenant was continuing; an action brought thereon after the removal of the gate for damages occasioned by cattle coming on the plaintiff's land in consequence of there being no gate, and a recovery therein, were no bar to another action on the same covenant for damages accruing after the commencement of the first suit. The defendants' default was not a total breach, nor declared and recovered on as such, and hence they were

R. Co., 128 N. Y. 436, 28 N. E. Rep. 518, 13 L. R. A. 401; *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. 584, 30 N. E. Rep. 741.

<sup>1</sup> *Uline v. New York Central R. Co.*, 101 N. Y. 88, 54 Am. Rep. 661, 4 N. E. Rep. 536; *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125.

<sup>2</sup> *Grand Rapids, etc. R. Co. v. Van*

*Dusen*, 29 Mich. 431; *Royalton v. Royalton & W. Turnpike Co.* 14 Vt. 311; *Withers v. Reynolds*, 2 B. & Ad. 883; *Fish v. Folley*, 6 Hill, 54, explained in *Crain v. Beach*, 2 Barb. 124; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. Rep. 170.

<sup>3</sup> 2 N. Y. 86, 2 Barb. 120.

not thereby relieved of the continuing obligation of the covenant. If it were an entire contract, however, any breach would be or might be treated as a total breach.<sup>1</sup> Covenants for support and maintenance during life are entire, and any breach entitles the injured party to recover entire damages for a total breach,<sup>2</sup> but as they impose a continuous duty the injured party may have a succession of actions treating any acts of breach as partial only.<sup>3</sup>

## SECTION 2.

## PARTIES TO SUE AND BE SUED.

§ 128. **Damages to parties jointly injured entire.** Before leaving the subject of the entirety of causes of action and damages it is proper to notice some points relative to parties. At common law all the parties who are jointly injured by a tort or breach of contract may sue jointly for damages; in actions *ex contractu* the rule is imperative. All the parties [204] with whom the violated contract was made must join as plaintiffs unless their interests are severed in the contract, so that upon a breach a distinct cause of action accrues to each or less than all.<sup>4</sup> Actions for personal injuries to a married woman must be in the names of the husband and wife;<sup>5</sup> except where

<sup>1</sup> Fish v. Folley, 6 Hill, 54.

<sup>2</sup> Schell v. Plumb, 55 N. Y. 592; Dresser v. Dresser, 35 Barb. 573; Shaffer v. Lee, 8 id. 412; Trustees of Howard College v. Turner, 71 Ala. 429, 46 Am. Rep. 326; Carpenter v. Carpenter, 66 Hun, 177, 20 N. Y. Supp. 928; Empie v. Empie, 35 App. Div. 51, 54 N. Y. Supp. 402. See Wright v. Wright, 49 Mich. 624, 14 N. W. Rep. 571.

<sup>3</sup> Id.; Fiske v. Fiske, 20 Pick. 499; Berry v. Harris, 43 N. H. 376; Ferguson v. Ferguson, 2 N. Y. 360; Turner v. Hadden, 62 Barb. 480.

<sup>4</sup> Bigelow v. Reynolds, 68 Mich. 344, 36 N. W. Rep. 95; Hall v. Leigh, 8 Cranch, 50; Fugure v. Mutual Society of St. Joseph, 46 Vt. 362; Cleaves v. Lord, 3 Gray, 66; Jewett v. Cunard,

3 Woodb. & M. 277; Little v. Hobbs, 8 Jones, 179, 78 Am. Dec. 275; Gridley v. Starr, 1 Root, 281; Farmer v. Stewart, 2 N. H. 97; Eastman v. Ramsey, 3 Ind. 419; Millard v. Baldwin, 3 Gray, 484; Dow v. Clark, 7 Gray, 198; Weathers v. Ray, 4 Dana, 474; Frankem v. Trimble, 5 Pa. 520; Ross v. Milne, 12 Leigh, 204, 37 Am. Dec. 646; Thompson v. Page, 1 Met. 566; The Ship Potomac, 2 Black, 581; Archer v. Bogue, 4 Ill. 526; Robertson v. Reed, 47 Pa. 115; Sawyer v. Steele, 4 Wash. 227; Newcomb v. Clark, 1 Denio, 226; Law v. Cross, 1 Black, 533; Beetle v. Anderson, 98 Wis. 6, 73 N. W. Rep. 560.

<sup>5</sup> Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. Rep. 56; White v. Vicksburg, etc. R. Co., 42 La. Ann. 990, 8 So.

statutes have so enlarged the property rights of married women as to enable them to maintain such actions in their own names.<sup>1</sup> In an action for malicious prosecution of husband and wife each has a separate right of action, and they cannot join their causes of action; but the husband is a necessary co-plaintiff with the wife in her action.<sup>2</sup> If the duty of supporting a child devolves upon the father and he is alive when the mother sues for an injury to the child she cannot maintain the action, notwithstanding she has been divorced and the care and custody of the child were awarded her.<sup>3</sup>

§ 129. **Actions under statutes.** In actions brought under statutes which create a liability where none existed at common law, the parties who sue thereunder must bring themselves clearly within the language used by the legislature. Such statutes will not be extended or enlarged by construction.<sup>4</sup> The relief or remedy is not available to any person who is not included therein.<sup>5</sup> If the right to sue for an injury which has resulted in death is given to a "child," an illegitimate child cannot recover for its mother's death in England,<sup>6</sup> nor in Canada;<sup>7</sup> but it is otherwise in Ohio under a statute

Rep. 475; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. Rep. 407; *Ezell v. Dodson*, 60 Tex. 331; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. Rep. 223; *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364; *Northern Central R. Co. v. Mills*, 61 Md. 355; *Blair v. Chicago & A. R. Co.*, 89 Mo. 384. Compare *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. Rep. 17, 6 L. R. A. 553.

<sup>1</sup> *Chicago, etc. R. Co. v. Dunn*, 52 Ill. 260; *Musselman v. Galligher*, 32 Iowa, 383; *Chadron v. Glover*, 43 Neb. 732; 62 N. W. Rep. 62.

A wife may maintain an action in her own name against a woman who has alienated from her the affection and deprived her of the society of her husband, although they live together as husband and wife. *Foot v. Card*, 58 Conn. 1, 18 Am. St. 258, 18 Atl. Rep. 1027, 6 L. R. A. 829; *Bennett v. Bennett*, 116 N. Y. 584, 24 N. E. Rep. 17, 6 L. R. A. 553; *Humphrey*

*v. Pope*, 122 Cal. 253, 54 Pac. Rep. 847. See ch. 38.

<sup>2</sup> *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. Rep. 380.

<sup>3</sup> *Keller v. St. Louis*, 152 Mo. 596, 54 S. W. Rep. 438, 47 L. R. A. 391.

<sup>4</sup> *Sutherland*, Const. of Stats., § 371.

<sup>5</sup> *Id.*; *McNamara v. Slavens*, 76 Mo. 330; *Gibbs v. Hannibal*, 82 id. 143; *Warren v. Englehart*, 13 Neb. 283, 13 N. W. Rep. 401; *Woodward v. Chicago & N. R. Co.*, 23 Wis. 400; *Dickins v. New York Central R. Co.*, 23 N. Y. 158; *Tennessee Coal, Iron & R. Co. v. Herndon*, 100 Ala. 451, 14 So. Rep. 287; *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 So. Rep. 455; *Maule Coal Co. v. Partenheimer*, 155 Ind. 100, 109, 55 N. E. Rep. 751.

<sup>6</sup> *Dickinson v. Northeastern R. Co.*, 2 H. & C. 735.

<sup>7</sup> *Gibson v. Midland R. Co.*, 2 Ont. 658, 15 Am. & Eng. R. R. Cas. 507.

which uses the words "next of kin."<sup>1</sup> Where an action is given for the benefit of the widow and next of kin it may be brought, though there be no widow, if there are next of kin, and *vice versa*.<sup>2</sup> Nor are the "next of kin" required to be so nearly related to the person whose death is sued for as to require any duty of sustenance, support or education.<sup>3</sup>

**§ 130. Must be recovered by person in whom legal interest is vested.** The suit must be brought in the name of the party in whom is vested the legal interest though the equitable interest be in another person.<sup>4</sup> The funds of a voluntary association were put under the control and management of trustees who took a note payable to themselves on lending the funds to some other members. It was held that the trustees in their individual names were entitled to maintain an action on the note, as it was payable to them, though the defendants as well as themselves were members of the association beneficially interested in the collection.<sup>5</sup> One who pays the consideration for a privilege or benefit which he may confer upon another may sue for the denial of it.<sup>6</sup> A trustee who has sold trust property without assigning a claim for damages resulting from a wrong done thereto prior to the sale may bring suit to recover therefor.<sup>7</sup> In an action by a firm the name of a dormant partner need not and ought not to be used<sup>8</sup> unless

<sup>1</sup> Muhl v. Michigan Southern R. Co., 10 Ohio, 272. See ch. 37.

<sup>2</sup> Sutherland, Const. of Stats., § 371, citing McMahon v. Mayor, 33 N. Y. 642, 647.

<sup>3</sup> Tilley v. Hudson River R. Co., 24 N. Y. 474; Galveston, etc. R. Co. v. Kutac, 72 Tex. 643, 37 Am. & Eng. R. R. Cas. 470, 11 S. W. Rep. 127; Petrie v. Columbia, etc. R. Co., 29 S. C. 303, 7 S. E. Rep. 515; Railroad Co. v. Barron, 5 Wall. 90; Baltimore, etc. R. Co. v. Hauer, 60 Md. 449, 12 Am. & Eng. R. R. Cas. 149, 155.

<sup>4</sup> 1 Chitty Pl. 2-6; Treat v. Stanton, 14 Conn. 445; Denton v. Denton, 17 Md. 403; Sunapee v. Eastman, 32 N. H. 470; Pike v. Pike, 24 N. H. 384; Phillips v. Pennywit, 1 Ark. 59; Lapham v. Green, 9 Vt. 407; Governor v.

Ball, Hempst. 541; Lord v. Carnes, 98 Mass. 305; Hart v. Stone, 30 Conn. 94; Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614; Yeager v. Wallace, 44 Pa. 94; Morton v. Webb, 7 Vt. 123; Boardman v. Keeler, 2 Vt. 65; Clarkson v. Carter, 3 Cow. 84; Mitchell v. Dall, 2 H. & G. 159; Lord v. Baldwin, 6 Pick. 352; Wilson v. Wallace, 8 S. & R. 55; Warner v. Griswold, 8 Wend. 666; Clark v. Miller, 4 Wend. 628.

<sup>5</sup> Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614.

<sup>6</sup> Trustees of Howard College v. Turner, 71 Ala. 429, 46 Am. Rep. 326.

<sup>7</sup> Lancaster v. Connecticut Mut. L. Ins. Co., 92 Mo. 460, 1 Am. St. 739, 5 S. W. Rep. 23.

<sup>8</sup> Clark v. Miller, 4 Wend. 628.

he is one of the parties disclosed in the contract.<sup>1</sup> The parties to a contract are the persons in whom the legal interest in the subject of it is deemed to be vested, and who therefore must be the parties to the action which is instituted for the purpose of enforcing it or recovering damages for its violation.<sup>2</sup> An agent who has sold property on credit, pursuant to authority from and for his principal, may sue the purchaser in his own name if he is bound to account to the owner or if he has accounted to him for it.<sup>3</sup> An undisclosed principal may sue on a contract made for his benefit by an agent.<sup>4</sup> An agreement to relinquish a business and not to carry it on thereafter in a designated place, no limit being specified as to time, and a bond conditioned for the observance thereof, are not so personal to the obligee that he cannot sue thereon for a breach of the agreement after he has transferred the property and business for the benefit of his vendee. There seems no doubt, upon the authorities, that the agreement could be transferred with and as an incident of the property, the purchase being made with knowledge of the condition of the bond.<sup>5</sup> The contrary doctrine is held in Oregon.<sup>6</sup> The English cases referred to in the note are not considered in that case; and the California case cited is distinguished because the word "heirs" was used in the contract there passed upon while it was not employed in the one before the court. The breach of a covenant which runs with land gives the widow who occupies it as a homestead a right of action though she was not to pay for it.<sup>7</sup>

[205] § 131. Not joint when contract apportions the legal interests. Where the contract separates and apportions the legal interests, the injury in case of a breach is correspondingly

<sup>1</sup> Clark v. Carter, 2 Cow. 84; Lord v. Baldwin, 6 Pick. 352.

<sup>2</sup> Treat v. Stanton, 14 Conn. 445; Daugherty v. American U. Tel. Co., 75 Ala. 168, 51 Am. Rep. 435.

<sup>3</sup> Fuller v. Curtis, 100 Ind. 237, 50 Am. Rep. 786; Jackson v. Mott, 76 Iowa, 263, 41 N. W. Rep. 12.

<sup>4</sup> Bell v. Lee, 78 Ala. 511, 56 Am. Rep. 52.

<sup>5</sup> Webster v. Buss, 61 N. H. 40, 6 Am. Rep. 317; Guerand v. Dandelet, 32 Md. 562, 3 Am. Rep. 164; Cali-

fornia Steam Nav. Co. v. Wright, 6 Cal. 258, 8 id. 585; Pemberton v. Vaughan, 10 Q. B. 87; Hastings v. Whitley, 2 Ex. 611. It was held in the last case that a suit might be brought by the executors of the obligee for a breach arising after his death.

<sup>6</sup> Hillman v. Shannahan, 4 Ore. 163, 18 Am. Rep. 281.

<sup>7</sup> St. L., I. M. & S. R. v. O'Baugh, 49 Ark. 418, 5 S. W. Rep. 711.



separate and distinct. Thus a promise to pay the respective owners of land taken for a road such sums as a referee named shall award gives each a separate action for the amount awarded him.<sup>1</sup> A contract between a fruit company and a number of fruit growers to receive, dry, and market their crops, at specified rates per pound, that delivered by each person being weighed and dried separately, and then weighed out to the owner and mingled with other fruit, a receipt being given each owner, is several.<sup>2</sup>

§ 132. **Implied assumpsit follows the consideration.** Where the *assumpsit* is implied it will follow the consideration.<sup>3</sup> A committee appointed by a school district to repair a school-house took the job among themselves, each performing work and furnishing a separate portion of materials. Each had a distinct cause of action.<sup>4</sup> By the failure of I. to fulfill a promise made to G. and S. to enter satisfaction of a judgment against them the judgment was collected entirely out of the property of G.; he could recover in an action by himself alone for money paid.<sup>5</sup> If money is deposited with a stakeholder on the event of a wager by one who acts as an agent for several others, each of the latter may bring a separate action to recover the money deposited for him, though the stakeholder was ignorant of the principals on whose account the deposit was made.<sup>6</sup> Several plaintiffs claiming distinct rights cannot join in the same action.<sup>7</sup>

§ 133. **Effect of release by or death of one of several entitled to entire damages.** Where a cause of action *ex contractu* accrues to several jointly it is an entirety; they must all join in an action upon it; no others can, except where assignments are sanctioned by statute as a transfer of the legal right of action, or unless that right devolves upon others by operation of law as in case of death or marriage. It cannot be severed by partial assignment,<sup>8</sup> nor by the giving of a re-

<sup>1</sup> Farmer v. Stewart, 2 N. H. 97;  
Jewett v. Cunard, 3 Woodb. & M. 277;  
State Ins. Co. v. Belford, 2 Kan. App.  
280, 42 Pac. Rep. 409.

<sup>2</sup> Arnold v. Producers' Fruit Co.,  
128 Cal. 637, 61 Pac. Rep. 283.

<sup>3</sup> Lee v. Gibbons, 14 S. & R. 110.

<sup>4</sup> Geer v. School District, 6 Vt. 76.

<sup>5</sup> Taylor v. Gould, 57 Pa. 152.

<sup>6</sup> Yates v. Foot, 12 Johns. 1.

<sup>7</sup> Barry v. Rogers, 2 Bibb, 314;  
Hinchman v. Paterson R. Co., 17 N.  
J. Eq. 75, 86 Am. Dec. 253; Chambers  
v. Hunt, 18 N. J. L. 339.

<sup>8</sup> Chicago, etc. R. Co. v. Nichols, 57  
Ill. 464.

[206] lease by one of several jointly entitled to sue. Such a release would operate to extinguish the right of action at law; for if, for such a reason, all to whom the right of action accrued cannot join in a suit upon it no action can be maintained.<sup>1</sup> But one of several joint creditors between whom no partnership exists cannot release the common debtor so as wholly to conclude his co-creditors who do not assent. He may defeat an action at law, but they will be entitled to assert their rights in equity. It is a general rule that joint creditors cannot, by a division of their claim between themselves, acquire a separate right of action against their debtor, either at law or in equity; but when a debtor procures a release from a part of them he cannot object to the others proceeding against him in equity.<sup>2</sup> On the death of one of two persons who have a joint right of action upon contract, it survives, and the survivor alone is entitled to sue. The personal representatives of the deceased cannot be joined with him.<sup>3</sup> By consent a joint demand may be severed so that several suits may be brought.<sup>4</sup> So an assignee of the whole or a part may sue in his own name, if the debtor promise to pay him,<sup>5</sup> but not otherwise.<sup>6</sup>

§ 134. **Misjoinder of plaintiffs, when a fatal objection.** In such action it is a fatal objection, available on the trial, that there is a misjoinder of plaintiffs.<sup>7</sup> It is equally so in actions *ex delicto*.<sup>8</sup> And in actions *ex contractu* the non-joinder of all the parties in whom the right of action is vested is fatal, and [207] the objection may be taken on the trial.<sup>9</sup> But in ac-

<sup>1</sup> Hall v. Gray, 54 Me. 230; Kimball v. Wilson, 3 N. H. 96; Myrick v. Dame, 9 Cush. 248, 69 Am. Dec. 284; Tuckerman v. Newhall, 17 Mass. 581; Eaton v. Lincoln, 13 Mass. 424. See Eisenhart v. Slaymaker, 14 S. & R. 154.

<sup>2</sup> Upjohn v. Ewing, 2 Ohio St. 13; Hosack v. Rogers, 8 Paige, 229; Carington v. Crocker, 37 N. Y. 336.

<sup>3</sup> Jackson v. People, 6 Mich. 154; Smith v. Franklin, 1 Mass. 480; Walker v. Maxwell, id. 113; Morrison v. Winn, Hardin, 480; Beebe v. Miller, Minor, 364; Brown v. King,

1 Bibb, 462; Clark v. Parish, id. 547; Chandler v. Hill, 2 Hen. & Mun. 124.

<sup>4</sup> Parker v. Bryant, 40 Vt. 291; Carington v. Crocker, 37 N. Y. 336.

<sup>5</sup> Page v. Danforth, 53 Me. 174.

<sup>6</sup> Hay v. Green, 12 Cush. 282.

<sup>7</sup> Brent v. Tivebaugh, 12 B. Mon. 87; Blakey v. Blakey, 2 Dana, 460; Doremus v. Selden, 19 Johns. 213; Waldsmith v. Waldsmith, 2 Ohio, 333, 15 Am. Dec. 547; Robinson v. Scull, 3 N. J. L. 817.

<sup>8</sup> Glover v. Hunnewell, 6 Pick. 222; Ainsworth v. Allen, Kirby, 145.

<sup>9</sup> Dob v. Halsey, 16 Johns. 34; Ehle

tions of tort the non-joinder of a party who ought to join as co-plaintiff can only be taken advantage of by plea in abatement or upon the trial by an apportionment of damages.<sup>1</sup>

**§ 135. Joinder of defendants; effect of non-joinder and misjoinder.** By the common law all joint promisors should be joined as defendants; and all should be sued, or only one, on a joint and several contract.<sup>2</sup> On a joint and several promissory note made by a firm in the firm name and by another person in his individual character, a suit may be maintained against the members of the firm without joining the other maker, they, for this purpose, being considered but one person, the non-joinder of the other being no ground of objection.<sup>3</sup> Where, some weeks after the execution of a lease of real estate, a third person, by writing obligatory, became surety for the lessee they were not jointly liable and could not be joined as defendants.<sup>4</sup> Two or more persons cannot be sued jointly unless a joint liability is proved.<sup>5</sup> On the death of one joint promisor the liability survives at law against the remaining or surviving promisor, and the personal representative of the deceased cannot be joined as co-defendant.<sup>6</sup> Many persons may join in one instrument without making themselves jointly bound. Whether they have done so or not is a question [208] of intention to be determined by the construction of the entire contract. The undertaking of each may be several, as is usual in subscriptions for some common purpose, and sometimes in

v. Purdy, 6 Wend. 629; Hansel v. Morris, 1 Blackf. 307; McIntosh v. Long, 2 N. J. L. 274; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286; Ellis v. McLemoor, 1 Bailey, 13; Coffee v. Eastland, Cooke, 159; Sweigart v. Berk, 8 S. & R. 308; Morse v. Chase, 4 Watts, 456; Connolly v. Cottle, Breese, 364; Beach v. Hotchkiss, 2 Conn. 697; Baker v. Jewell, 6 Mass. 460, 4 Am. Dec. 162; Halliday v. Doggett, 6 Pick. 359; Gordon v. Goodwin, 2 N. & McC. 70, 10 Am. Dec. 573.

<sup>1</sup> Wright v. Bennett, 2 Barb. 451; White v. Webb, 15 Conn. 302.

<sup>2</sup> Damron v. Sweetser, 16 Ill. App. 339; Deloach v. Dixon, Hempst. 428;

Merrick v. Trustees of Bank, 8 Gill, 59; Minor v. Mechanics' Bank, 1 Pet. 73; Bangor Bank v. Treat, 6 Me. 207, 19 Am. Dec. 210; Fielden v. Lahens, 9 Bosw. 436; Claremont Bank v. Wood, 12 Vt. 252; Keller v. Blasdel, 1 Nev. 491.

<sup>3</sup> Van Tine v. Crane, 1 Wend. 524.

<sup>4</sup> Tourtelott v. Junkin, 4 Blackf. 483.

<sup>5</sup> Rowan v. Rowan, 29 Pa. 181.

<sup>6</sup> Sigler v. Interest, 3 N. J. L. 724; Gillin v. Pence, 4 T. B. Mon. 304; Murphy v. Branch Bank, 5 Ala. 421; Poole v. McLeod, 1 Sm. & M. 391; Union Bank v. Mott, 27 N. Y. 633; Voorhis v. Childs' Ex'r, 17 id. 354.

other promises to pay.<sup>1</sup> Joining too many persons as defendants in an action upon contract is a fatal objection and may be taken advantage of on the trial;<sup>2</sup> but if less than all those jointly liable are sued the objection of the non-joinder of others can only be taken advantage of by plea in abatement unless it appears on the face of the declaration.<sup>3</sup>

§ 136. **How joint liability extinguished or severed.** If one jointly or jointly and severally liable is released by a satisfaction, all are discharged.<sup>4</sup> So a specialty taken from one merges any simple contract liability, not only of the person giving the specialty, but of others who were jointly liable with him.<sup>5</sup> Thus where a mercantile business was carried on in a single name and the merchant in whose name it was conducted bought goods and executed a specialty for the price, the vendor, though ignorant at the time that such purchaser had a dormant partner, but who discovered that fact after the death of the purchaser who executed the specialty, was held not entitled to maintain *assumpsit* on the simple contract against the dormant partner because that contract was extinguished.<sup>6</sup> According to some authorities the satisfaction and discharge of one who was not in fact liable to the person injured does

<sup>1</sup> Larkin v. Butterfield, 29 Mich. 254.

<sup>2</sup> Tuttle v. Cooper, 10 Pick. 281; Walcott v. Canfield, 3 Conn. 194; Livingston v. Tremper, 11 Johns. 101; Erwin v. Devine, 2 T. B. Mon. 124; Jenkins v. Hart, 2 Rand. 446.

<sup>3</sup> Bragg v. Wetzell, 5 Blackf. 95; Burgess v. Abbott, 6 Hill, 135; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; Hicks v. Cram, 17 Vt. 449; Means v. Milliken, 33 Pa. 517; Douglas v. Chapin, 26 Conn. 76.

<sup>4</sup> Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. Rep. 704; Donaldson v. Carmichael, 102 Ga. 40, 29 S. E. Rep. 135; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. Rep. 518; Gross v. Pennsylvania, etc. R. Co., 65 Hun, 191, 20 N. Y. Supp. 28; Blackman v. Simpson, 120 Mich. 377, 79 N. W. Rep. 573;

State v. Watson, 44 Mo. 305; Heckman v. Manning, 4 Colo. 543; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; Line v. Nelson, 38 N. J. L. 358; Bonney v. Bonney, 29 Iowa, 448; Prince v. Lynch, 38 Cal. 528.

Where judgment was rendered against two defendants upon a verdict which apportioned their liability, a motion to vacate it and dismiss the action as to one was denied on the ground that it might operate as a discharge of both. McCool v. Mahoney, 54 Cal. 491. See Minor v. Mechanics' Bank, 1 Pet. 46, 87.

A similar verdict was considered as being against one defendant, and a finding in favor of the other against whom the smaller sum was charged. Clissold v. Machell, 25 Up. Can. Q. B. 80, 26 id. 422.

<sup>5</sup> Ward v. Motter, 2 Rob. (Va.) 536.  
<sup>6</sup> Id.

not affect the rights of the latter against those who are liable;<sup>1</sup> several courts take the opposing view.<sup>2</sup> Joint tort-feasors may be sued jointly in the same action or in separate actions, and several judgments may be rendered in either action; these do not affect the liability of any of the parties unless satisfaction in some form is made.<sup>3</sup> But the issue of an execution or the granting of an order for issuance seems to be considered a satisfaction in Indiana.<sup>4</sup> The satisfaction of a judgment against a builder for the substitution of inferior material and for doing work in an unworkmanlike manner bars an action by the same plaintiff against the architect who made the plans for the building and contracted to supervise its erection in accordance therewith. It is said the former suit against the builder was based on his violation of the building contract, while this suit appears to have been brought for the purpose not only of recovering damages from the defendant for his alleged neglect as an architect, but also to recover damages arising in consequence of the omissions, negligence, unfaithfulness and wrongdoing of the builder. It is true that the acts of the builder which formed the basis for the damages awarded in the suit against him are now alleged to have been allowed to occur by reason of the architect's negligence in the performance of his duty. But whether the wrongdoing complained of in the former case be the joint act of the builder and the defendant, or the several tort of each, can make no difference in determining the validity of the plea or the admissibility of the record in evidence in this case. If the defendant and the

<sup>1</sup> Missouri, etc. R. Co. v. McWhorter, 59 Kan. 345, 53 Pac. Rep. 135, citing Turner v. Hitchcock, 20 Iowa, 310; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Wilson v. Reed, 3 Johns. 175; Wardell v. McConnell, 25 Neb. 558, 41 N. W. Rep. 548; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Bell v. Perry, 43 Iowa, 368; Owen v. Brockschmidt, 54 Mo. 285; Pogel v. Meilke, 60 Wis. 248, 18 N. W. Rep. 927.

<sup>2</sup> Leddy v. Barney, 139 Mass. 394, 2 N. E. Rep. 107; Leither v. Philadelphia Traction Co., 125 Pa. 397, 17 Atl.

Rep. 338; Tompkins v. Clay Street R. Co., 66 Cal. 163; Miller v. Beck, 108 Iowa, 575, 79 N. W. Rep. 344; Butler v. Ashworth, 110 Cal. 614, 43 Pac. Rep. 386.

<sup>3</sup> Grundel v. Union Iron Works, 127 Cal. 438, 59 Pac. Rep. 826, 78 Am. St. 75, 47 L. R. A. 467; Vincent v. McNamara, 70 Conn. 332, 39 Atl. Rep. 444; Lovejoy v. Murray, 3 Wall. 1; Norfolk Lumber Co. v. Simmons, 2 Marvel, 317, 43 Atl. Rep. 163. See § 216.

<sup>4</sup> Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. Rep. 69.

builder had both been sued in the first case for the injury there alleged, there could have been but one recovery. And it would seem to be very clear reason, and authority as well, that the same result must follow when the same injury is caused by the independent acts of several wrong-doers. The reason of this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury whether that injury be done by one or more.<sup>1</sup>

**§ 137. Principles on which joint right or liability for tort determined.** Whether actions in tort are joint as to the [209] parties injured or as to those liable depends on very plain principles. The injury is joint where it at once affects property or interests jointly owned; in other words, there must be a community of interest between the parties injured in that which the injury affects. And to render wrong-doers jointly liable there must be concert or a common purpose between them.<sup>2</sup> Persons who are jointly interested in the damages recoverable for an injury to property may unite in a suit for their recovery although they are not joint owners of the property itself. Thus two persons in possession of land carrying on business in a mill which belongs to one of them only may unite in an action for damages for a negligent burning of it.<sup>3</sup>

<sup>1</sup> *Berkley v. Wilson*, 87 Md. 219, 39 Atl. Rep. 502, citing *Cleveland v. Bangor*, 87 Me. 264, 32 Atl. Rep. 892; *Brown v. Cambridge*, 3 Allen, 474; *Lovejoy v. Murray*, 3 Wall. 1; *Gunter v. Lee*, 45 Md. 67, 24 Am. Rep. 504.

<sup>2</sup> If one or more persons conspire with another to commit, or two or more persons combine together to effect, the violation of a contract, and their object be effected to the damage of a third person, the latter may recover against him who broke the contract, and against those so connected with the wrong. *Martens v. Reilly*, 109 Wis. 464, 84 N. W. Rep. 840. See *Quinn v. Leathem*, [1901] App. Cas. 495.

Where the complaint alleged that each of two defendants was negligent in not having a sufficient wall to sustain his building, by reason

whereof both buildings fell upon and destroyed the plaintiff's building, at the same time and on the whole of said building and both of which became an undistinguishable mass, as was the building on which they fell, so that it could not be said which produced the greater damage, and it could not be determined as to the extent of the damage either did, both defendants were liable for the whole damage and neither could complain that both were sued jointly. If the evidence showed that either was not negligent he would not be liable, in which case the others would have no reason to complain of the misjoinder. *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. Rep. 744.

<sup>3</sup> *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Rhoads v. Booth*, 14 Iowa, 575.

If injury is done both to the possession and the freehold, and the interests of both owners are affected, though in different degrees, the life tenant and the remainder-man may join in case for the recovery of the damages.<sup>1</sup> All joint owners of personal property are rightly joined in actions for tortious injuries thereto.<sup>2</sup> At common law the rule was that "when two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in the action or the defendant may plead in abatement."<sup>3</sup> As to tenants in common who bring actions against third parties a distinction existed between real and personal actions. "When the action is in the realty they must sue separately;<sup>4</sup> when in the personalty they must join."<sup>5</sup> This rule must give way if the effect of enforcing it will be to deny a remedy. The remedy for it — to protect defendants from a multiplicity of suits — is good; but if adherence to it will cause a failure of justice the reason for departing from the rule is stronger than that for applying it because there is a possibility that no other suit will be brought on the cause of action; while there is a certainty that adherence to it will work the loss of a remedy. These considerations induced the Minnesota court to permit one tenant in common of personalty to maintain an action against a stranger for a wrong done to it, the co-tenants refusing to join as plaintiffs; and being non-residents they could not be made defendants.<sup>6</sup>

### § 138. Tortious act not an entirety as to parties injured.

A tortious act is not an entirety as to the persons affected by

<sup>1</sup> McIntire v. Westmoreland Coal Co., 118 Pa. 108, 11 Atl. Rep. 808.

<sup>2</sup> Glover v. Austin, 6 Pick. 209; Pickering v. Pickering, 11 N. H. 141.

But in California one joint owner can recover but one-half the damages for the injury done to the joint property. Loveland v. Gardner, 79 Cal. 317, 21 Pac. Rep. 766, 4 L. R. A. 395.

If two machines are bought on joint account and paid for out of joint funds the fact that the purchasers entered into a separate contract for each machine and that each contract was signed by one of them only in his individual name does not pre-

clude parol proof that the purchase of each machine was made by one of them as agent for the other and on their joint account; such evidence will sustain a joint action for breach of warranty of the machines. Fox v. Stockton Harvester, etc. Works, 83 Cal. 333, 23 Pac. Rep. 295.

<sup>3</sup> 1 Chitty Plead. 64.

<sup>4</sup> Carley v. Parton, 75 Tex. 98, 12 S. W. Rep. 950.

<sup>5</sup> Hill v. Gibbs, 5 Hill, 56; Rowland v. Murphy, 66 Tex. 534, 1 S. W. Rep. 658.

<sup>6</sup> Peck v. McLean, 36 Minn. 228, 1 Am. St. 665, 30 N. W. Rep. 754.

it; it may affect many persons and do a several injury to each. A single trespass upon real estate, injurious to the possession and to the inheritance, will be an entire cause of action if one person has the whole title and is in possession. But if one person has the possession and another a reversionary title a distinct wrong is done to each, for which each may bring a separate and independent action.<sup>1</sup> One having a special interest in real estate injured by the tortious act of another may recover damages therefor whether the wrong-doer is a stranger or has another interest in the same premises.<sup>2</sup> The purchaser of a crop of growing grass is entitled to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal, and may maintain trespass *quare clausum fregit* against a stranger who during that time wrongfully enters and cuts and carries away the grass.<sup>3</sup> [210] He could maintain a like action against the general owner of the land for such a trespass.<sup>4</sup>

§ 139. **General and special owners.** In such case the damages will be according to the tenure by which the plaintiff holds and such as result from the injury he has suffered. He must show that his title gives him an interest in the damages he claims, and can recover none except such as affect his right.<sup>5</sup> In actions against a stranger for taking or converting personal property, a bailee, mortgagee or other special property man is entitled to recover its full value, but must account to the general owner for the surplus recovered beyond the value of his own interest; but against the general owner, or one in privity

<sup>1</sup> Wood v. Williamsburgh, 46 Barb. 601; Gilbert v. Kennedy, 22 Mich. 5; Files v. Magoon, 41 Me. 104; Stevens v. Adams, 1 Thomp. & C. 587; Stoner v. Hunsicker, 47 Pa. 514; Adams v. Emerson, 6 Pick. 57; Robbins v. Borman, 1 Pick. 122; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. Rep. 266, 36 L. R. A. 519; Yeager v. Fairmont, 43 W. Va. 259, 27 S. E. Rep. 234.

In Pennsylvania a joint action may be maintained. McIntire v. Westmoreland Coal Co., 118 Pa. 108, 11 Atl. Rep. 808.

<sup>2</sup> Hasbrouck v. Winkler, 48 N. J. L.

431, 6 Atl. Rep. 22; Luse v. Jones, 39 N. J. L. 707; Turnpike Co. v. Fry, 88 Tenn. 296, 12 S. W. Rep. 720.

<sup>3</sup> Dolloff v. Danforth, 43 N. H. 219; Howard v. Lincoln, 13 Me. 122; Austin v. Hudson River R. Co., 25 N. Y. 334.

<sup>4</sup> Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; Caldwell v. Julian, 2 Mills, 294.

<sup>5</sup> Gilbert v. Kennedy, 22 Mich. 5.

One who has borrowed property cannot maintain an action for its loss. Lockhart v. Western & A. R. Co., 73 Ga. 472, 44 Am. Rep. 883.



with him, only the value of the special property.<sup>1</sup> Where goods assigned to a creditor in trust to pay himself and other creditors were attached at the suit of some of the creditors as property of the assignor before the assignment was assented to by any creditor but the assignee, and the value of the goods exceeded the amount of the latter's demand, in an action of trespass brought by the assignee against the attaching officer, the measure of damages was the amount of the plaintiff's demand against the assignor and not the value of the goods.<sup>2</sup> An officer, with an execution against one of two partners, who makes himself a trespasser *ab initio* by levying on the entire property of the concern, still represents the interest of the execution debtor, and the owner of the other interest can recover against him only the value thereof.<sup>3</sup>

Several persons having separate and distinct interests in a chattel cannot unite in replevin for it;<sup>4</sup> two persons cannot join in suing for an injury done to one of them.<sup>5</sup> Where [211] two constables levy on the same goods by virtue of separate executions they cannot join in an action against one who takes away the goods.<sup>6</sup> One of several joint debtors whose separate goods are taken on execution and wasted must sue alone for redress; and so if the officer extorsively demand and receive of the debtors illegal fees.<sup>7</sup> Actions for torts connected with the matter of a contract, where the tort consists in the mere omission of a contract duty, must be brought by the party in-

<sup>1</sup> *Denver, etc. R. Co. v. Frame*, 6 Colo. 332; *White v. Webb*, 15 Conn. 302; *Seaman v. Luce*, 23 Barb. 240; *Chadwick v. Lamb*, 29 Barb. 518; *Rhoads v. Woods*, 41 Barb. 471; *Sherman v. Fall River Iron Co.*, 5 Allen, 213; *Bartlett v. Kidder*, 14 Gray, 449; *Russell v. Butterfield*, 21 Wend. 300; *Fallon v. Manning*, 35 Mo. 271; *Chaffee v. Sherman*, 26 Vt. 237; *Soule v. White*, 14 Me. 436; *Mead v. Thompson*, 78 Ill. 62; *Guttner v. Pacific Steam Whaling Co.*, 96 Fed. Rep. 617, citing the text; *Armory v. Delamire*, 1 Str. 505; *The Jersey City*, 2 C. C. A. 365, 51 Fed. Rep. 527; *Knight v. Carriage Co.*, 18 C. C. A. 287, 71 Fed. Rep. 662; *The Mercedes*, 108 Fed. Rep. 559.

A recent English case holds that a bailee who is under no liability to his bailor cannot recover for an injury to the property held by him. *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

<sup>2</sup> *Boyden v. Moore*, 11 Pick. 362; *Mantonya v. Martin Emerich Outfitting Co.*, 172 Ill. 92, 49 N. E. Rep. 721, citing the text.

<sup>3</sup> *Berry v. Kelly*, 4 Robert. 106.

<sup>4</sup> *Chambers v. Hunt*, 18 N. J. L. 339.

<sup>5</sup> *Winans v. Denman*, 3 N. J. L. 124.

<sup>6</sup> *Warne v. Rose*, 5 N. J. L. 809.

<sup>7</sup> *Ulmer v. Cunningham*, 2 Me. 117.

jured.<sup>1</sup> In one suit the court will not take cognizance of distinct and separate claims of different persons. Where the damage as well as the interest is several each party must sue separately.<sup>2</sup> Whether the plaintiffs in a joint action are co-partners or not is immaterial so long as their cause of action is shown to be joint.<sup>3</sup>

§ 140. **Joint and several liability for torts.** If injuries or damage are sustained through the affirmative acts or negligence of several persons an action may be brought against all or any of them.<sup>4</sup> If separate judgments are obtained the

<sup>1</sup> Fairmount R. Co. v. Stutler, 54 Pa. 375, 93 Am. Dec. 714.

The assignment by one member of a firm of all his right, title and interest in and to the partnership assets gives the assignee such an interest in a claim secured by a mortgage on crops as makes him a proper co-plaintiff with the other partner in an action for the conversion of the crops or a special action on the case in the nature of trover for damages thereto. Keith v. Ham, 89 Ala. 590, 7 So. Rep. 234.

<sup>2</sup> Hufnagel v. Mt. Vernon, 49 Hun, 286, 1 N. Y. Supp. 787; Governor v. Hicks, 12 Ga. 189; Rhoads v. Booth, 14 Iowa, 575; Schaeffer v. Marienthal, 17 Ohio St. 183.

<sup>3</sup> Wood v. Fithian, 24 N. J. L. 33.

<sup>4</sup> Williams v. Sheldon, 10 Wend. 654; Merryweather v. Nixan, 8 T. R. 186; Wheeler v. Worcester, 10 Allen, 591; Murphy v. Wilson, 44 Mo. 313, 100 Am. Dec. 390; Moore v. Appleton, 26 Ala. 633.

Some authorities state the rule thus: If injuries or damage are sustained through the affirmative acts or negligence of several persons acting jointly, or, if contributed to by each, in pursuance of a joint purpose, an action may be brought against all or any of them. Others, and the weight of authority favors the rule as stated in the text, ignore the necessity for joint action or the exist-

ence of a common purpose; as where, by the separate, but concurrent, negligence of two carriers a passenger is injured by a collision, or a person is simultaneously arrested on two warrants issued at the instance of two persons. Colgrove v. New York, etc. R. Co., 20 N. Y. 492, 75 Am. Dec. 419; Slater v. Mersereau, 64 N. Y. 147; Boyd v. Watt, 27 Ohio St. 268; City Electric St. R. Co. v. Conery, 61 Ark. 381, 54 Am. St. 262, 31 L. R. A. 570; 33 S. W. Rep. 426; Pine Bluff Water & Light Co. v. McCain, 62 Ark. 118, 35 S. W. Rep. 227; Klauber v. McGrath, 35 Pa. 118, 78 Am. Dec. 329; Peckham v. Burlington, Brayton, 134; Allison v. Hobbs, 96 Me. 26, 51 Atl. Rep. 245; Boston & A. R. Co. v. Shanly, 107 Mass. 568; Newman v. Fowler, 37 N. J. L. 89; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. Rep. 660; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706; Pugh v. Chesapeake & O. R. Co., 101 Ky. 77, 72 Am. St. 392, 39 S. W. Rep. 695; Stone v. Dickson, 5 Allen, 29, 81 Am. Dec. 727; Cuddy v. Horn, 46 Mich. 603, 10 N. W. Rep. 32; Flaherty v. Minneapolis, etc. R. Co., 39 Minn., 328, 40 N. W. Rep. 160, 12 Am. St. 654; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493; Brown v. Cox, 75 Fed. Rep. 689. See § 141 and note. But this doctrine has been doubted. Lull v. Fox & Wisconsin Imp. Co., 19 Wis. 100; Trowbridge v.

plaintiff may enforce the one which is for the largest sum.<sup>1</sup> The rule concerning the bringing of actions applies in equity as well as at law.<sup>2</sup> Such persons may participate so as to be thus liable by preconcert to do the wrong complained of, or to

Forepaugh, 14 Minn. 133; Larkins v. Eckwurz, 42 Ala. 322, 94 Am. Dec. 651; Powell v. Thompson, 80 Ala. 51.

It has been said, *arguendo*, of a complaint which set up the separate and distinct wrongs of the respective defendants and sought to enforce a joint liability for acts which were not joint in themselves nor bound together by the tie of a common purpose, that this cannot be done; the wrong done must be jointly done in fact by the defendants, or if contributed to by each, a joint purpose must be imputable to them before they can be said to be joint tort-feasors, and responsible jointly and severally for the resulting injury. It will not suffice, as a general proposition at least, that the separate wrongful acts or omissions of two persons, having no connection with each other, the motive of each being foreign to that of the other, have in their unintended coalescence and co-action produced an injury. *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. Rep. 495; *Ensley Lumber Co. v. Lewis*, 121 Ala. 100, 25 So. Rep. 729.

This appears to be in conformity with the rule in England. In a recent case the plaintiff brought an action for negligently excavating near his house, whereby it was damaged; the defendant attributed the damage, wholly or in part, to the negligence of a water company in leaving a main insufficiently stopped. The court declined to join such company as a defendant because the torts were separate, though the resulting damage was the same in each case. *Thompson v. London County Council*, [1897] 1 Q. B. 84.

In an earlier case against two defendants it was alleged that each of them, by their several acts, and that they by their combined acts, obstructed the plaintiff's access to his premises, and an injunction and damages were prayed against each of them; it was determined that the action could not be maintained; that one of the defendants must be struck out. *Sadler v. Great Western R. Co.*, [1896] App. Cas. 450, affirming [1895] 2 Q. B. 688.

Where a municipality is bound to see that its streets and sidewalks are kept in proper condition, it cannot be joined as a defendant with a resident property owner whose duty it is to see that the walk adjoining his premises is in good repair for an injury resulting from his neglect. Their co-operation is not of a nature which makes them joint wrongdoers. *Dutton v. Lansdowne*, 198 Pa. 563, 48 Atl. Rep. 494. See *Wiest v. Electric Traction Co.*, 200 Pa. 148, 49 Atl. Rep. 891.

<sup>1</sup> *Roodhouse v. Christian*, 55 Ill. App. 107; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. Rep. 706; *Pugh v. Chesapeake & O. R. Co.*, 101 Ky. 77, 72 Am. St. 392, 39 S. W. Rep. 695; *Blackman v. Simpson*, 120 Mich. 377, 79 N. W. Rep. 573; *Berkson v. Kansas City Cable R. Co.*, 144 Mo. 211, 45 S. W. Rep. 1119; *Burk v. Howley*, 179 Pa. 539, 36 Atl. Rep. 327, 57 Am. St. 607; *Koch v. Peters*, 97 Wis. 492, 73 N. W. Rep. 25.

<sup>2</sup> *Hopkins v. Oxley Stave Co.*, 28 C. C. A. 99, 103, 83 Fed. Rep. 912, citing *Cunningham v. Pell*, 5 Paige, 607; *Wall v. Thomas*, 41 Fed. Rep. 620.

procure it to be done, as well as by jointly taking part in it, or by subsequently adopting the act done or neglect suffered as principals.<sup>1</sup> The extent of individual participation in, or of expected benefit from, a joint tort is immaterial; each and all of the tort-feasors are liable for the entire damage.<sup>2</sup> The law [212] is thus accurately and comprehensively laid down in a New York case: "To entitle the plaintiff to a verdict against all the defendants as joint trespassers it must appear that they acted in concert in committing the trespass complained of; if some aided and assisted the others to commit the trespass or assented to the trespass committed by others, having an interest therein, they are all jointly guilty; . . . it would not be material if they had unequal interests in the avails of the trespass; for those who confederate to do an unlawful act are deemed guilty of the whole although their share in the profits may be small. But if any of the defendants are not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone without any concert with the others, they ought to be acquitted and those only found guilty who were acting jointly."<sup>3</sup> The fact that one who orders an act done, which results in injury to a third person, gave such order as the officer of a municipal or private corporation does not

<sup>1</sup>Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. Rep. 553; Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N. E. Rep. 290, 88 Ill. App. 589; Lewis v. Read, 13 M. & W. 834; Davis v. Newkirk, 5 Denio, 92; Cook v. Hopper, 23 Mich. 511; Bonnel v. Dunn, 28 N. J. L. 153; Ford v. Williams, 13 N. Y. 584; Ball v. Loomis, 29 N. Y. 412; Hyde v. Cooper, 26 Vt. 552; Lewis v. Johns, 34 Cal. 629; Adams v. Freeman, 9 Johns. 118; Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234; Hume v. Oldacre, 1 Stark. 351; Stewart v. Wells, 6 Barb. 81; Wheeler v. Worcester, 10 Allen, 591.

<sup>2</sup>McCool v. Mahoney, 54 Cal. 491; Learned v. Castle, 73 id. 454, 18 Pac. Rep. 872, 21 id. 11; McCalla v. Shaw, 72 Ga. 458; Everroad v. Gabbert, 83 Ind. 489; Westbrook v. Mize, 35 Kan. 299, 10 Pac. Rep. 881; Sharpe v. Williams, 41 Kan. 56; Boaz v. Tate, 43 Ind. 60; Breedlove v. Bundy, 96 id. 319; Page v. Freeman, 19 Mo. 421; Wright v. Lathrop, 2 Ohio, 275; Knickerbacker v. Colver, 8 Cow. 111; Turner v. Hitchcock, 20 Iowa, 310; Nelson v. Cook, 17 Ill. 443; McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386; Brown v. Perkins, 1 Allen, 89; Barden v. Felch, 109 Mass. 154; Williams v. Sheldon, 10 Wend. 654; Currier v. Swan, 63 Me. 323; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. Rep. 588; Hunter v. Wakefield, 97 Ga. 543, 25 S. E. Rep. 347; Sternfels v. Metropolitan Street R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309; Hill v. Ninth Avenue R. Co., 109 N. Y. 239, 16 N. E. Rep. 61.

<sup>3</sup>Williams v. Sheldon, 10 Wend. 654; Howard v. Dayton Coal & Iron Co., 94 Ga. 416, 20 S. E. Rep. 336.

absolve him from liability for the consequences.<sup>1</sup> The rule is that two or more persons cannot be held jointly liable for verbal slander.<sup>2</sup> While admitting this it is said in a recent case in which slander of title was the ground of the action, that under circumstances where all the defendants are jointly concerned and interested and participate in the general purpose, their concert and co-operation may be shown although the false and malicious statements may have been made by one alone.<sup>3</sup> Where a master is liable for the tort of his servant, a principal for that of his agent or deputy, they are jointly liable.<sup>4</sup> If an officer takes property of a wrong person on process he, as well as the party or attorney who directs it and even the sureties who execute a bond of indemnity to the officer covering that tort, may be held jointly liable.<sup>5</sup> An action for deceit in the nature of a conspiracy cannot be sustained against a principal for the unauthorized fraudulent acts and representations of the agent alone.<sup>6</sup> According to the Iowa court if one joint wrongdoer was actuated by malice his condition of mind will be attributed to the others, and each will be liable for all the damages, actual and exemplary, resulting from the wrong.<sup>7</sup> But this we regard as a very doubtful proposition. In Kentucky a cause of action under the common law against one party for compensatory damages cannot be joined with an action against another party for punitive damages, the right thereto resting on a statute, although both causes of action arose out of the same transaction.<sup>8</sup>

<sup>1</sup> *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Myers v. Daubenbiss*, 84 Cal. 1, 23 Pac. Rep. 1027.

<sup>2</sup> *Blake v. Smith*, 19 R. I. 476, 34 Atl. Rep. 995. See *State v. Marlier*, 46 Mo. App. 233; *Butts v. Long*, 94 id. 687, 692.

<sup>3</sup> *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. Rep. 290. See *Thomas v. Rumsey*, 6 Johns. 26.

<sup>4</sup> *Balme v. Hutton*, 9 Bing. 471; *Waterbury v. Westervelt*, 9 N. Y. 598; *Morgan v. Chester*, 4 Conn. 387; *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38; *Newberry v. Lee*, 3 Hill, 523; *Crook v. Wright*, R.

& M. 278; *Armstrong v. Dubois*, 4 Keyes, 291.

<sup>5</sup> *Murray v. Lovejoy*, 2 Cliff. 191; *Lovejoy v. Murray*, 3 Wall. 1; *Lewis v. Johns*, 34 Cal. 629; *Knight v. Nelson*, 117 Mass. 458; *Ball v. Loomis*, 29 N. Y. 412; *Herring v. Hoppock*, 15 N. Y. 409; *Root v. Chandler*, 10 Wend. 110, 35 Am. Dec. 546; *Vincent v. McNamara*, 70 Conn. 332, 39 Atl. Rep. 444.

<sup>6</sup> *Page v. Parker*, 40 N. H. 47.

<sup>7</sup> *Reizenstein v. Clark*, 104 Iowa, 287, 292, 73 N. W. Rep. 588, citing this section. See ch. 9.

<sup>8</sup> *Clayton v. Henderson*, 103 Ky. 228, 44 S. W. Rep. 667, 44 L. R. A. 474.

§ 141. **Same subject.** In an action for diverting water from a natural water-course so as to flood the plaintiff's land it appeared that the defendant did it by walling the banks on his [213,214] own land to preserve them. A third person, by certain acts wholly independent of defendant's and without concert with him, increased the volume of water that flowed upon such land. The defendant was only liable for the flooding caused by him, and not for that part of the plaintiff's damages resulting from the increased volume of water caused by such third person.<sup>1</sup> But where nine different creditors, acting without concert and without knowing that they were employing a common agent, wrongfully caused their debtor to be arrested by the same officer on their several writs, service being made simultaneously, and by virtue thereof committed the debtor to jail where he was confined upon all of the writs at the same time, they were deemed joint trespassers, and full satisfaction recovered by the debtor from one of them was held a bar to an action against the others.<sup>2</sup> It is not possible to

<sup>1</sup> Wallace v. Drew, 59 Barb. 413.

<sup>2</sup> Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Allison v. Hobbs, 96 Me. 26, 51 Atl. Rep. 245. Bigelow, J., said in the Massachusetts case: As a matter of first impression, it might seem that the legal inference from . . . (the fact that the defendants acted separately and independently of each other without any apparent concert among themselves) . . . is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he was unlawfully arrested and imprisoned. This is the wrong

which constitutes the gist of the action, and for which he is entitled to indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. The writs against him were all served simultaneously, by the same officer, acting for all the creditors, and the confinement was enforced by the jailor on all the processes, contemporaneously, during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were, therefore, simultaneous and contemporaneous acts, committed on him by the same person, acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful or unlawful act, committed by a common agent, acting for several and distinct principals.

harmonize the cases on the extent of the co-operation which makes parties jointly liable. It seems perfectly proper that an unlawful act done by one person, though it be in furtherance of a lawful purpose in the accomplishment of which others are engaged, should not make the latter liable if it is done without their concurrence, and no benefit is received by them from it.<sup>1</sup> Where the effects of the independent acts of two

"It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who without preconcert had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the party injured. Whether the act was done by the procurement of one person or of many, and,

if by many, whether they acted from a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with the privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only." See *Wehle v. Butler*, 12 Abb. Pr. (N. S.) 139.

<sup>1</sup> *Wert v. Potts*, 76 Iowa, 612, 14 Am. St. 252, 41 N. W. Rep. 374.

One does not become a participant in an assault and battery by witnessing and mentally approving it, no word or sign being used. *Lister v. McKee*, 79 Ill. App. 210.

After mortgaged goods were wrongfully attached by creditors of the mortgagor other creditors placed their writs in the officer's hands and he indorsed returns of a levy upon the same goods, subject to the first levy. It appears to have been the opinion of the court that if such subsequent attaching creditors did nothing further they might not have

persons on opposite sides of a street united in causing injury, there being no concert of action, they were held not jointly liable.<sup>1</sup> So where a dam was filled with deposits of coal dirt from different mines on the stream above the dam, worked by persons having no connection with each other, it was held that they were not jointly liable for the combined results of throwing coal dirt into the river by all the workers of the mines; that the ground of action was not the deposit of dirt in the dam by the stream but the negligent act above. Throwing the dirt into the stream was the tort; the deposit in the dam only the consequence. The tort of each was several when committed and did not become joint because its consequences united with other consequences.<sup>2</sup> Agnew, J., referring to the [216] instructions of the trial court asserting a joint liability or the liability of each for the combined results, said: "The doctrine of the learned judge is somewhat novel, though the case itself is new; but if correct is well calculated to alarm all riparian owners who may find themselves by slight negligence overwhelmed by others in gigantic ruin. It is immaterial what may be the nature of their several acts or how small their share in the ultimate injury. If instead of coal dirt others were felling trees and suffering their tops and branches to float down the stream finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the

been liable jointly with the officer and the original attaching creditor, in the absence of proof showing concert of action (*Sparkman v. Swift*, 81 Ala. 231, 8 So. Rep. 160; *Lee v. Maxwell*, 98 Mich. 496, 57 N. W. Rep. 581); but they afterward joined together in directing and assisting the officer in selling the goods, and in bringing a suit in equity to set aside the mortgage as fraudulent, and to enjoin a sale of the property by the mortgagee, in consequence of which acts they and the indemnitors of the officer became jointly liable with the officer and the first attaching creditors. *Koch v. Peters*, 97

Wis. 492, 73 N. W. Rep. 25, citing *Lovejoy v. Murray*, 3 Wall. 1.

Where creditors employed the same attorney and separate attachments were levied on the property of their debtor, neither creditor being in any way interested in the claim of any other creditor or its prosecution, the creditors were not joint tort-feasors. *Miller v. Beck*, 108 Iowa, 575, 79 N. W. Rep. 344.

<sup>1</sup> *De Donato v. Morrison*, 160 Mo. 581, 61 S. W. Rep. 641; *Bard v. Yohn*, 26 Pa. 482; *Leidig v. Bucher*, 74 Pa. 67; *Wiest v. Electric Traction Co.*, 200 Pa. 148, 49 Atl. Rep. 891.

<sup>2</sup> *Little Schuylkill, etc. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209.



acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot and throw it upon the same pile would each be liable for the whole if the final result be the only criterion of liability." The court rejected this view and held as above. The judge further said: "True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that others do. This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test."<sup>1</sup>

<sup>1</sup> In *Hillman v. Newington*, 56 Cal. 57, the plaintiff was entitled to four hundred inches of the water in a creek; the defendants severally and without concert of action diverted water to such an extent that he did not receive that quantity. In passing upon the question of misjoinder of parties defendant the court said: "It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly because no one of them alone is guilty of any wrong. Each of them diverts some of the water; and the

aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action no wrong could be committed, and we think that in such a case all who act must be held to act jointly. If there be a surplus [of water] the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendants' answer that each one of them is acting independently of every other one shows that the wrong complained of is not the result of their joint action; and if it does not the answer in that respect is insufficient to constitute a defense. The case so far as we are advised is *sui generis*. No parallel case is cited by either side." See § 142.

As to the measure of co-operation necessary to make persons joint

Separate owners are not jointly liable for injuries jointly committed by their respective animals though the latter happen to unite in a single transaction. Each owner is liable only for the injury committed by his own animal; and his liability is based on his duty to restrain it and his neglect in allowing it to go at large where, in pursuing its known natural inclination, it may do damage.<sup>1</sup> If, however, separate owners keep animals in common and by a concurring negligence or design suffer them to run at large as one herd, they are jointly liable for all damages by the united trespass of all or any of them.<sup>2</sup> Where three persons, on returning from a horseback ride, opened a gate leading to a vacant lot in which was a horse owned by a fourth person, and turned their horses into such lot, and one of these three horses injured such other horse, each of those persons was liable as a joint tort-feasor for such injury, regardless of whether they owned the horses they turned in or knew that they were vicious.<sup>3</sup> Two railroad companies used the same track by joint arrangement, governed by common rules; their trains collided owing to mutual and concurring negligence and caused a single injury. They were held jointly liable.<sup>4</sup> The same rule applies to adjoining

wrong-doers in a conspiracy to ruin the business of another, see *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. Rep. 924, 68 Am. St. 203, 43 L. R. A. 797; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. Rep. 840; *State v. Huegin*, 110 Wis. 189, 89 N. W. Rep. 1046.

<sup>1</sup> *Dyer v. Hutchins*, 87 Tenn. 198, 10 S. W. Rep. 194; *Auchmuty v. Ham*, 1 Denio, 495; *Wilbur v. Hubbard*, 35 Barb. 303; *Partenheimer v. Van Order*, 20 id. 479; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9 (the rule in Vermont has been changed by statute, *Remele v. Donohue*, 54 Vt. 555; *Fairchild v. Rich*, 68 Vt. 202, 34 Atl. Rep. 692); *Van Steinburgh v. Tobias*, 17 Wend. 562; *Buddington v. Shearer*, 20 Pick. 477; *Nierenberg v. Wood*, 59 N. J. L. 112, 35 Atl. Rep. 654.

Under a statute expressing that

every owner or keeper of a dog engaged in doing damage to sheep, lambs, or other domestic animals shall be liable in an action of tort to the county for all damages so done, the liability is for all the damages in the doing of which the dog engages. *Worcester County v. Ashworth*, 160 Mass. 186, 35 N. E. Rep. 773; *Nelson v. Nugent*, 106 Wis. 477, 82 N. W. Rep. 287. The same conclusion has been reached under a statute less general in its language. *Kerr v. O'Connor*, 63 Pa. 341.

<sup>2</sup> *Jack v. Hudnall*, 25 Ohio St. 255, 18 Am. Rep. 298.

<sup>3</sup> *Martin v. Farrell*, 66 App. Div. 177, 77 N. Y. Supp. 934. See § 140, note.

<sup>4</sup> *Colegrove v. New York, etc. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418. See § 140, note.

land-owners by whose concurring negligence an insecure party-wall is maintained.<sup>1</sup>

§ 142. *Same subject.* A statute giving a joint action to any person who shall be injured in his means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons, gives a right of action against all such persons who participate in causing a particular or several particular intoxications of a person; if damages result therefrom the person injured may sue such persons jointly or severally; and also all persons who, only by the sale of liquor to any person, materially contribute to make him a habitual drunkard may be sued jointly by the person injured in consequence. But the two classes cannot be sued jointly, and those who alone contributed to cause habitual intoxication made responsible jointly with those who only contributed to the particular intoxication and the reverse.<sup>2</sup> Under the Iowa statute concerning liability for the results of the sale of liquors, whoever contributes to a single act of intoxication, though by sales of liquor made in separate places, whereby distinct damages are caused, is a joint wrong-doer.<sup>3</sup> But there is no joint liability unless the persons made defendants contributed to a specific act or acts of intoxication.<sup>4</sup> In an earlier case the court say: "A joint liabil-

<sup>1</sup> *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329.

<sup>2</sup> *Tetzner v. Naughton*, 12 Ill. App. 148.

<sup>3</sup> *Kearney v. Fitzgerald*, 43 Iowa, 580.

<sup>4</sup> *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. Rep. 882.

*Boyd v. Watt*, 27 Ohio St. 259, is a novel and interesting case. The widow of Dr. Watt brought an action; the complaint alleged that he was a physician with an extensive practice, from the profits of which he was able to furnish her comfortable means of support; that about April, 1865, he became and was in the habit of getting intoxicated, and

so continued until his death in 1869, of which the defendant had notice; that during that period and at sundry and divers times the defendant sold him in quantities of from one pint to a quart intoxicating liquors, causing said Watt to become intoxicated and an habitual drunkard; and by reason thereof during said period, and resulting therefrom, he became incapable of attending to his usual business, and squandered his estate, and so deprived her of her means of support. Johnson, J., speaking for a majority of the court, said: "The statute gives the action against 'any person who shall . . . have caused the intoxication.' This intoxication

ity arises where an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them, will not create a joint liability although the wrongs may be com-

may be 'habitual or otherwise.' A right of action is given for damages resulting from single cases of intoxication or from habitual intoxication. Under the code several distinct causes of action may be joined in one action for damages growing out of distinct cases of intoxication, where each cause of action is separate and distinct, and is between the same parties; but if on trial it appears that some of the acts of intoxication were caused by others, no recovery as to them could be had. In such case the causes of action are separate, and the damages resulting from each are distinct and disconnected; and the causes of action should be separately stated and numbered.

"In such a case the question would be as to each case of intoxication, who caused it, and what damages resulted from it. What would constitute a causing of a single act under the statute to render one liable would then arise. That question is not made in this case. The charge is of causing *habitual* intoxication for a series of years. The damages alleged are not the proximate results from distinct cases, but the ultimate result of habitual intoxication. This continued habit of drinking is alleged to have rendered the husband incapable of attending to his business, and caused him to squander his estate. This final result deprived the plaintiff of her means of support. It is a charge of repeated illegal acts, producing by their united effects an ultimate *state or condition* of Dr. Watt, out of which the damages arise. The plaintiff asks to recover the damages resulting from this *state or con-*

*dition* of her husband, caused by repeated illegal sales for a series of years, and not the damages from a single case of intoxication, nor of a series of distinct cases at different times, caused by separate and distinct illegal sales. The means used were sales in quantity by the pint and quart. To a person of Dr. Watt's habits, frequent sales in such quantity were calculated to produce the result complained of. Every person is presumed to have intended the natural and probable consequences of his acts. The defendant was, in violation of law, using means calculated to produce the alleged injury. If the jury found that this was so, and that the means so employed were so continued as to produce the condition of the husband alleged, then they had the right to presume he intended the result which followed, though others, with or without preconcert, contributed to cause it. The intent with which the act or acts are done is always an important element in the case. In this case it is peculiarly so. The means used, the force or agency employed, are to be considered in ascertaining that intent. If, as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is the *sole* cause of the habitual intoxication, and no recovery can be had unless the damages can be separated (an impossibility in most cases of this class), then this part of the statute is virtually a dead letter.

"Why should the defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have

mitted against the same person. There must be concurrent action, co-operation or a consent or approval in the accomplishment by the wrong-doers of the particular wrong in order

also contributed by like means to this result? He was using adequate means to produce the result, and may, therefore, fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business; but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during this four years another or others had also contributed. Such is not the law in criminal cases at common law, as will be shown hereafter; and we know no reason for greater strictness under this statute than in cases of the highest crimes known to the law. This section of the statute, we take it, is to be construed by ordinary canons of construction."

The foregoing views of the court presuppose that the defendant insisted on complete exemption from responsibility because other persons made sales to Dr. Watt. But the case as reported does not disclose that any such position was taken. The defendant asked the court to charge the jury "that the defendant was only liable for damages to the plaintiff occasioned by intoxication produced by the intoxicating liquor which the defendant himself had sold to said Dr. Watt, and that the defendant was not liable for any damages produced by the intoxication of said Dr. Watt, occasioned by intoxicating liquors sold to him during said period by other persons;" which charge the court refused to give except with the following qual-

ifications: "Should you find that the defendant sold intoxicating liquor to Joseph Watt in violation of law within the time charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of said Watt, caused thereby to her person, property or means of support, the fact that other persons also sold liquor to said Watt, in violation of law, within that period, and which liquor may have contributed to increase the intoxication, and consequently to enhance the injury resulting to the plaintiff therefrom; such facts, if they be shown to have existed, will not exonerate the defendant from the consequence of his wrongful acts; but, on the contrary, he will still be responsible for all the injury resulting to the plaintiff from the intoxication of Joseph Watt, caused by his illegal sale of liquor to him. *If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from sales by others, you must do so; but if such separation cannot be made you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in person, property or means of support by reason of the intoxication of the said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by the defendant contributed.*"

The judgment for the plaintiff was affirmed. And upon the state of facts supposed by the defendant's request, the appellate court treat the defendant and all other persons who sold liquor to Dr. Watt as jointly and severally liable — as joint tort-feasors. On that point the learned judge who

to make them jointly liable.”<sup>1</sup> But where it is provided that the person who furnishes the liquor which causes the intoxication “in whole or in part,” habitual or otherwise, shall be liable, the damages cannot be apportioned; full recovery may be had against any one who contributed to the result complained of.<sup>2</sup>

delivered the majority opinion states the defendant's position and the answer as follows: “Counsel properly admit that where two or more act by concert in an unlawful design each is liable for *all damages*, but claim if each acts independently, or without the knowledge of the other, then he is only liable for his own acts. In the former case the acts of others co-operating are his acts, because they are only in furtherance of a common unlawful design. If there is no common intent there can be no joint liability, but each is responsible for his own act. If there is a common intent, or one without such intent aids one with it in doing an unlawful act, the latter is nevertheless guilty, though not the sole cause. They claim this principle is limited to cases of conspiracy or concerted action. In this we think they mistake the authorities. We hold that this common intent, which is sufficient to create mutual liability, may exist without previous agreement or a common understanding to do the unlawful act, and that it may be presumed to exist when the means employed create that presumption as well as by proving an express agreement.”

This “common intent which is sufficient to create mutual liability” is, further on in the opinion, thus elucidated: “If the defendant was using the means calculated to produce the injury, the law presumes that he intended to produce it. If others, with or without concert, were concurrently co-operating with him, using

like means, they were acting with the same common design, and if the injury resulted each is liable, though each was acting without the knowledge of what the other was doing. So if the defendant alone was using such means as created this presumption of intent to do the act and another, without concert, free from such intent, was contributing to the injury, the former is liable for all damages, notwithstanding the other also contributed.”

The majority of the court came to the conclusion that vendors of intoxicating liquors who separately sell to a man, who, by thus imbibing, in a period of several years, becomes an habitual drunkard, are in law jointly and severally liable for that result, though they have no concert in the sense of communicating with each other on the subject; though they do not act together, that is, no two of them join in any one sale, and each may be unacquainted with the others, and perhaps may not even know that there are others; though the only circumstance that is supposed to join and unify them is they are engaged in the same kind of business and each is doing such a business as has a tendency to make drunkards, and in a particular case they have thus made one.

<sup>1</sup> *La France v. Krayner*, 43 Iowa, 143; *Hitchner v. Ehlers*, 44 id. 40; *Faivre v. Manderscheid*, — Iowa, —, 90 N. W. Rep. 76.

<sup>2</sup> *Neuerberg v. Gaultier*, 4 Ill. App. 348; *Bryant v. Tidgewill*, 133 Mass. 86; *Werner v. Edmiston*, 24 Kan.

Each partner is an agent of the firm of which he is a member for the purpose of carrying on its business in the way it is usually prosecuted; hence an ordinary partnership is liable for the results of the negligence of any one of its members in conducting its affairs in the usual way.<sup>1</sup> Such liability extends to the fraudulent or malicious conduct of one partner though the others had no knowledge of it, if the act was done for the benefit of the firm and was within the scope of the partnership.<sup>2</sup> But it does not embrace acts done beyond such scope,<sup>3</sup> unless they are authorized or adopted by the firm.<sup>4</sup> A partnership is also responsible for the negligence of its servants subject to the same limitations.<sup>5</sup>

147; *Rantz v. Barnes*, 40 Ohio St. 43; *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. Rep. 170.

This is the rule applied in Michigan, although the statute does not contain the words "in whole or in part." *Steele v. Thompson*, 42 Mich. 596, 4 N. W. Rep. 536. See *Sutherland's Stat. Const.*, § 377.

<sup>1</sup> *Lindley's Part.* (2d Am. ed.) \*149; *Linton v. Hurley*, 14 Gray, 191; *Buckie v. Cone*, 25 Fla. 1, 6 So. Rep. 160; *Mode v. Penland*, 93 N. C. 292; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. Rep. 851; *Robinson v. Goings*, 63 Miss. 500; *Wiley v. Stewart*, 122 Ill. 545, 14 N. E. Rep. 835; *Hall v. Younts*, 87 N. C. 285; *Hyrne v. Erwin*, 23 S. C. 226; *Stroher v. Efting*, 97 N. Y. 102, 49 Am. Rep. 515.

<sup>2</sup> *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Locke v. Stearns*, 1 Met. 560, 35 Am. Dec. 382; *Durant*

*v. Rogers*, 87 Ill. 508; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Guillou v. Peterson*, 89 Pa. 163; *Robinson v. Goings*, 63 Miss. 500. But see *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Grund v. Van Vleck*, 69 Ill. 478; *Rosenkrans v. Barker*, 115 id. 331, 56 Am. Rep. 169, 3 N. E. Rep. 93.

<sup>3</sup> *Gwynn v. Duffield*, 66 Iowa, 708, 55 Am. Rep. 286, 24 N. W. Rep. 523; *Schwabacker v. Riddle*, 84 Ill. 517.

<sup>4</sup> *Graham v. Meyer*, 4 Blatch. 129; *Heirn v. McCaughan*, 32 Miss. 17; *Taylor v. Jones*, 42 N. H. 25; *Ernstman v. Black*, 14 Ill. App. 381; *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. Rep. 387.

<sup>5</sup> *Roberts v. Johnson*, 58 N. Y. 613; *Stables v. Eley*, 1 C. & P. 614; *Brent v. Davis*, 9 Md. 217; *Linton v. Hurley*, 14 Gray, 191.

## CHAPTER V.

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## SECTION 1.

## CIRCUITY OF ACTION.

§ 143. **Defense of.** The defense of circuity of action [220] is available where the parties stand in such legal relation to each other that if the plaintiff recovers against the defendant the latter, thereupon and by reason thereof, has a cause of action against the former for the very sum so recovered. The plaintiff's demand is then neutralized by his liability, consequent upon recovery, to pay back such sum; by a legal equation the plaintiff has no cause of action. This defense accomplishes the same result as would the circuity of action. Thus in an action against the surviving partner upon the promissory note of a partnership an indenture by which the plaintiff and others had covenanted to indemnify the defendant against

all debts due from the partnership and against all actions brought against him by reason of such debts was a bar to the action.<sup>1</sup> Under a statute which imposes a personal liability upon stockholders for the debts of a corporation, a creditor, who is himself a stockholder, cannot maintain an action to enforce such liability against a co-stockholder.<sup>2</sup> One who is a surety upon an official bond can not recover from his fellow-sureties the full amount of damages he has sustained by its breach.<sup>3</sup>

**§ 144. Agreements not to sue.** On this principle if a creditor makes a valid agreement never to sue his debtor upon a specified demand it operates to extinguish the debt like a release.<sup>4</sup> But when the covenant is that a demand shall not be put in suit within a limited time a breach thereof cannot be [221] pleaded in bar of that demand. The reason is that the damages for the breach of the latter covenant being uncertain and not determinable by the amount of the demand, the principle of circuity of action is not applicable.

**§ 145. Principle operates in favor of plaintiff.** The principle of avoiding circuity of action will sometimes operate in favor of the plaintiff. A town was compelled to pay damages for an injury resulting from a defect in a highway occasioned by the want of repair of a cellar way constructed in a sidewalk and leading to an adjoining building occupied by a

<sup>1</sup> Whitaker v. Salisbury, 15 Pick. 534; Austin v. Cummings, 10 Vt. 26.

<sup>2</sup> Gray v. Coffin, 9 Cush. 192, 206; Bailey v. Bancker, 3 Hill, 188, 38 Am. Dec. 625.

<sup>3</sup> Alderson v. Mendes, 16 Nev. 298.

The plaintiff declared on a note made by C. and payable to the plaintiff or his order, and afterwards indorsed by him to the defendant, who re-indorsed it to the plaintiff. After verdict for the latter the judgment was arrested. Bishop v. Hayward, 4 T. R. 470. But if it appears that the plaintiff's name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the

plaintiff, was substantially to be paid to the defendant, and the declaration so alleges, the defense of circuity of action is not good. Id.; Wilders v. Stevens, 15 M. & W. 208.

<sup>4</sup> Robinson v. Godfrey, 2 Mich. 408; Cuyler v. Cuyler, 2 Johns. 186; Phelps v. Johnson, 8 id. 54; Lane v. Owings, 3 Bibb, 247; Millett v. Hayford, 1 Wis. 401; Reed v. Shaw, 1 Blackf. 245; McNeal v. Blackburn, 7 Dana, 170; Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Sewall v. Sparrow, 16 Mass. 24; Gibson v. Gibson, 15 id. 106, 8 Am. Dec. 94; Jones v. Quinipiack Bank, 29 Conn. 25; Clark v. Bush, 3 Cow. 151; Dearborn v. Cross, 7 id. 48.

tenant; it was held that the occupant, and not the owner, was liable to the town for such damages, and was *prima facie* liable to third persons suffering injury from any such defect; but if there be an express agreement between the landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then the party injured, to avoid circuity, may bring his suit in the first instance against the landlord.<sup>1</sup>

§ 146. **Damages must be equal.** If a deed contains reciprocal covenants which are governed by the same rule of damages one covenant may be pleaded in bar to another to avoid circuity of action. But where the covenants are distinct and independent they cannot be so pleaded, for the damages may not be commensurate and each party must recover against the other separate damages according to the justice of the case.<sup>2</sup> This defense has been termed a setting off of one right of action against another.<sup>3</sup> It is available though the damages be unliquidated, but the damages on the two causes of action must be the same in amount as matter of law, and must so appear by the pleadings.<sup>4</sup> In other words, a good plea in avoidance of circuity of action must show that the sum which the defendant is entitled to recover from the plaintiff is necessarily the same as that in respect of which the plaintiff is suing. [222] The rigid severity and precision of this test are illustrated in the following case. By a charter-party it was agreed between the master and the charterers that one-third of the stipulated freight should be paid before the sailing of the vessel, the same to be returned if the cargo was not delivered at the port of destination, the charterers to insure the amount at the owner's expense, and deduct the cost of doing so from the first payment of freight. The charterers paid the one-third freight, deducting the premium for insurance. The vessel and cargo did not reach their destination. In an action by the charterers to re-

<sup>1</sup> Lowell v. Spaulding, 4 Cush. 277; Payne v. Rogers, 2 H. Bl. 349.

<sup>2</sup> Gibson v. Gibson, 15 Mass. 106, 112, 8 Am. Dec. 94; Guard v. White-side, 13 Ill. 7; Millett v. Hayford, 1 Wis. 401; Thurston v. James, 6 R. I. 103; Howland v. Marvin, 5 Cal. 501; Bac. Abr. Cov. L.

<sup>3</sup> Mayne on Dam. (6th ed.), p. 139.

<sup>4</sup> Id.; Turner v. Thomas, L. R. 6 C. P. 610; De Mattos v. Saunders, 7 id. 570; Walmesley v. Cooper, 11 A. & E. 216; Carr v. Stephens, 9 B. & C. 759; Connop v. Levy, 11 Q. B. 769.

cover the freight so paid, the owner pleaded that the loss of the part of the freight to be returned was such a loss as was by the charter-party to be insured against by the charterers at the owner's expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that although the plaintiffs might, with the use of reasonable care and diligence, have effected an insurance, whereby the defendant and the owner of the ship would have been fully indemnified against the loss of the one-third freight so to be returned, yet the plaintiffs effected the insurance so negligently and in such disregard of the usual course of business that the same became of no use or value, and the defendant, by reason of such improper conduct, had sustained damages to the amount of the said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to him such amount as he should have to return to the plaintiffs under the charter-party, and any sum paid or returned by the defendant to the plaintiffs in respect of the freight would be the damage sustained by the defendant by reason of such improper conduct and deviation, and he would be damnified to that extent. The court held that the plea was bad inasmuch as the conclusion it drew was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the insurance was a liability for damages which were not necessarily identical in amount with the claim set up by them in their action. Jervis, C. J.: "It is not denied that the rule in question is plain and well ascertained, viz.: that to justify a defendant in setting up a demand in avoidance of circuity of [223] action he must show that the sum which he claims to be entitled to recover back is of necessity the identical sum which the plaintiff is suing for. The only difficulty arises from the application of the rule. I was somewhat struck by a difficulty arising from the allegation in the plea that, by and through the negligent and improper conduct of the plaintiffs in effecting the insurance, the insurance became of no use or value and the defendant thereby sustained damage to the amount of one-third of the freight so insured; and that the plaintiffs thereby became liable to the defendant for the same, . . . and liable to make good to the defendant such amount as he should have

to return to the plaintiffs under the charter-party; and that the sum paid by the defendant to the plaintiffs, or received by them, . . . would be the damages sustained by the defendant by reason of such improper conduct. But I think my brother Channell has relieved me from that difficulty by suggesting that it is a mere conclusion drawn from the previous allegations,—not a conclusion of law necessarily resulting from such previous allegations, one which a jury might or might not arrive at. I think that unless the judge would be bound to tell the jury that the amount which the defendant claims by his plea is necessarily the same amount as the plaintiffs claim by their declaration the plea does not bring the case within the rule as to circuity of action. The case differs materially from those which were cited, . . . in which the defendant was bound to a liquidated and ascertained sum on the failure of the plaintiff to perform a duty. This is a matter which sounds in damages. The plaintiffs had undertaken to effect an insurance for the defendant with third persons; and it *may* be that in the result the defendant will be entitled to recover from the plaintiffs precisely the same amount of damages that the plaintiffs will recover in this action; but there are various circumstances which might by possibility arise to reduce the damages in that action to a lesser or even to a nominal amount; and unless the defendant could negative all these possible circumstances, he could not make this a good plea.”<sup>1</sup>

<sup>1</sup> Charles v. Altin, 15 C. B. 46. Crowder, J., doubted in this case. He said: “I have entertained considerable doubts during the argument, and I must confess that these doubts are not altogether removed; and although my lord and my two learned brothers think otherwise, it is with considerable reluctance that I should come to the conclusion that the plea is no answer to the declaration. The rule as to the avoidance of circuity of action is in my opinion a just and valuable one, and it is important that a case should be brought within it if possible. In point of fact and common sense nobody can doubt that, if

these plaintiffs recover back the one-third freight to-day and the defendant were to bring a cross-action against them, and to allege and prove what is stated in this plea, the jury would be directed to give damages to precisely the same amount.” After quoting the language of Mr. Justice Washington in *Morris v. Summerl*, 2 Wash. C. C. 203, he continued: “It is not said that, as a positive matter of law, he is responsible to that extent. It probably amounts to this, that the loss would be the reasonable measure of damages. The learned judge is referring to a course of dealing. The case before us arises upon

[224] § 147. **Reciprocal obligations.** The reciprocal obligations of the parties may be such that the action of one may be barred by a counter covenant which is not only a good defense on the ground of avoiding circuity of action, but also as a release. Of this nature is a covenant never to sue.<sup>1</sup> To sustain a bar in that form, however, the contract must be technically such as to amount to a release. But the defense of circuity of action does not depend on the principle of a release, but on the policy of the law against unnecessary litigation and the convenience of admitting a party to his ultimate right by the shortest and most direct process.

## SECTION 2.

### MUTUAL CREDIT.

§ 148. **Compensation by mutual demand.** Mutual debts or credits do not compensate each other except when pleaded [225] under statutes of set-off, unless they are so connected that the parties have reciprocally the right to retain out of the moneys they owe the amount they are creditors for. Then the accounts are reciprocal payments, and no demand exists upon either side except for the net balance. This is the case where the demands of both parties are, with their mutual consent, brought into one account as debit and credit;<sup>2</sup> and also wherever a party has a lien on moneys in his hands or which he holds for the satisfaction of a cross-demand in favor of himself, as in the case of factors, brokers and others. In an

a contract to insure the amount, — *the precise amount*, — which the plaintiffs are claiming under the charter-party to have returned to them; and the question is whether the breach of the engagement to insure does not so clearly entitle the defendant to recover from the plaintiffs the precise sum which they by their action are seeking to recover from him, as to warrant the plea. If this had been a contract of indemnity, there could have been no doubt." *Alston v. Herring*, 11 Ex. 822.

<sup>1</sup> *Smith v. Mapleback*, 1 T. R. 441;

*Johnson v. Carre*, 1 Lev. 152; *Harvey v. Harvey*, 3 Ind. 473; *Reed v. Shaw*, 1 Blackf. 245; *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *Phelps v. Johnson*, 8 Johns. 54; *Jones v. Quinipiack Bank*, 29 Conn. 25; *Walker v. McCulloch*, 4 Me. 421; *Lane v. Owings*, 3 Bibb. 247; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 341; *Shed v. Pierce*, 17 Mass. 623. See § 6.

<sup>2</sup> *Bond v. Clark*, 47 Vt. 565; *McNeil v. Garland*, 27 Ark. 343; *Sanford v. Clark*, 29 Conn. 457; *Myers v. Davis*, 26 Barb. 367; *Ang. on Lim.*, § 138.

early case a ship broker recovered for his principal a sum of money for damages done to his ship by collision; the broker paid over all but his charges for services, and it was held in a suit by the principal for the reasonable sum so retained that the defendant had a right to it. The action was for money had and received, and it was said the plaintiff should not receive more than he was in equity entitled to, and this could not be more than what remained after deducting all just allowances which the defendant was entitled to out of the very sum demanded; it was not in the nature of a cross-demand or mutual debt, but a charge which makes the sum received for the plaintiff's use so much less.<sup>1</sup>

In conformity to a natural equity that one debt shall compensate another, and for the convenience of commerce, the courts favor liens and recognize them, first, where there is an express contract; second, where one may be implied from the usage of trade; third, where it may be implied from the manner of dealing between the parties in the particular case; fourth, where the defendant has acted in the capacity of a factor.<sup>2</sup> Where it was part of the contract between a servant and his master that the former should pay out of his wages the value of his master's goods lost by his negligence it [226] was an agreement that the wages were to be paid only after deducting the value of the things lost, and their loss was provable under the general issue.<sup>3</sup> So where by the custom of the hat trade the amount of injury done to hats in dyeing was to be deducted from the dyer's wages, evidence of injury from this cause was admitted in reduction of damages.<sup>4</sup>

<sup>1</sup> Dale v. Sollet, 4 Burr. 2133; 1 Chitty's Pl. 563; Rawson v. Samuel, Cr. & Ph. 161; Green v. Farmer, 4 Burr. 2214; Patrick v. Hazen, 10 Vt. 183; Saltus v. Everett, 20 Wend. 267; Muller v. Pondir, 55 N. Y. 325; Dresser Manuf. Co. v. Waterson, 3 Met. 9; Turpin v. Reynolds, 14 La. 473; Holbrook v. Receivers, 6 Paige, 220. See Taft v. Aylwin, 14 Pick. 336; Schermerhorn v. Anderson, 2 Barb. 584; Citizens' Bank v. Carson, 32 Mo. 191.

<sup>2</sup>Id.

<sup>3</sup>Le Loir v. Bristow, 4 Camp. 134; Cleworth v. Pickford, 7 M. & W. 314.

<sup>4</sup>Bamford v. Harris, 1 Stark. 343. See Alder v. Keighley, 15 M. & W. 119. In this case the bankrupt had given the defendant a bill drawn by himself for 600*l.*, which the defendant agreed to discount, retaining 100*l.* and the discount. He never paid the bankrupt anything. The action was brought by the assignees for breach of the agreement. The jury gave a verdict for 495*l.*, being the amount of the bill, minus the 100*l.* and dis-

## SECTION 3.

## MITIGATION OF DAMAGES.

§ 149. **Equitable doctrine of.** Mitigation of damages is what the expression imports, a reduction of their amount; not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, nor of facts which constitute a cause of action in favor of the defendant; but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him. Facts [227] for mitigation are addressed to the equity of the law, and are admitted to assist in the application of the paramount rule that damages should not exceed just compensation unless the case calls for severity in the form of exemplary damages. But if a wrong is wilfully done courts are not inclined to allow the resulting damages to be mitigated by taking into account lawful acts of the wrong-doer which have benefited the other party.<sup>1</sup> There are, however, few, if any, exceptions to the rule that any circumstance competent as evidence to reduce the damages may be proven on the trial for that purpose although it may not have been effective until after the suit was begun.<sup>2</sup>

§ 150. **Absence of malice.** Matters may be proved in mitigation which tend to excuse or justify the act complained of, though they are not a full excuse or justification. Thus, where the plaintiff was taken into custody for an offense not justifying an arrest, evidence of the offense was allowed to be given, for it was in the nature of an apology for the defendant's con-

count. This was held correct, though the bill had become worthless on account of the bankruptcy. Pollock, C. B., said: "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not an action of trover, but of breach of contract. The defendant promised to deliver to the bankrupt the amount

of the bill, minus 100% and discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would be entitled to receive, had he continued solvent, by reason of the breach of contract."

<sup>1</sup> Whorton v. Webster, 56 Wis. 356, 14 N. W. Rep. 280. See § 155.

<sup>2</sup> Marsh v. McPherson, 105 U. S. 709, 716; Gabay v. Doane, 77 App. Div. 413, 79 N. Y. Supp. 312.



duct.<sup>1</sup> In trespass for false imprisonment the void warrant of arrest and proceedings had under it are admissible in evidence to disprove malice and prevent the recovery of exemplary damages,<sup>2</sup> but not to mitigate those which are compensatory.<sup>3</sup>

§ 151. Words as provocation for assault; agreements to fight. Although it is well settled that no words of provocation whatever will justify the offended party in inflicting a blow upon the offender,<sup>4</sup> they generally constitute an excuse which will mitigate the damages, and may be proved for that purpose.<sup>5</sup> But such provocation must be so recent as to induce the presumption that the violence was committed under the immediate influence of the passion thus excited.<sup>6</sup> The language of the parties is often so immediately associated and identified with the transaction that it is impracticable to suppress it in giving evidence of their conduct; and, indeed, the

<sup>1</sup> *Linford v. Lake*, 3 H. & N. 276; *Warwick v. Foulkes*, 12 M. & W. 507; *Wells v. Jackson*, 3 Munf. 458; *Paine v. Farr*, 118 Mass. 74.

<sup>2</sup> *Woodall v. McMillan*, 38 Ala. 622; *Wells v. Jackson*, 3 Munf. 458.

<sup>3</sup> *Lewis v. Lewis*, 9 Ind. 105. See §§ 1257, 1258.

<sup>4</sup> *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. Rep. 630, 15 L. R. A. 853.

<sup>5</sup> *Prindle v. Haight*, 83 Wis. 50, 52 N. W. Rep. 1134; *Burke v. Melvin*, 45 Conn. 243; *Kiff v. Youmans*, 86 N. Y. 324, 50 Am. Rep. 543; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. Rep. 98; *Frazer v. Berkeley*, 7 C. & P. 789; *Perkins v. Vaughan*, 5 Scott N. R. 881; *Thrall v. Knapp*, 17 Iowa, 468; *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. Rep. 333; *Cushman v. Ryan*, 1 Story, 91; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595; *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569; *Rochester v. Anderson*, 1 Bibb, 428; *McAlexander v. Harris*, 6 Munf. 465; *McBride v. McLaughlin*, 5 Watts, 375; *Waters v. Brown*, 3 A. K. Marsh. 557; *Corning v. Corning*, 6 N. Y. 97;

*Currier v. Swan*, 63 Me. 323; *Matthews v. Terry*, 10 Conn. 455; *Delevan v. Bates*, 1 Mich. 97; *Saltus v. Kipp*, 12 How. Pr. 342. See §§ 162, 1255.

<sup>6</sup> *Corning v. Corning*, *Rochester v. Anderson*, *supra*; *Ellsworth v. Thompson*, 13 Wend. 658.

A provocation in the morning does not mitigate an assault made in the afternoon of the same day. *Keiser v. Smith*, 71 Ala. 48, 46 Am. Rep. 342. And so with an assault made one day after the alleged cause. *Gronan v. Kuckkuck*, 59 Iowa, 18, 12 N. W. Rep. 748; *Carson v. Singleton*, 23 Ky. L. Rep. 1626, 65 S. W. Rep. 821.

In *Brooks v. Carter*, 34 Fed. Rep. 505, the defendant gave the plaintiff thirty minutes in which to retract statements made by him, and on his declining to do so made an assault. There was too much deliberation to allow the facts to mitigate the damages.

In *Irwin v. Porter*, 1 Hawaii, 159, a provocation given on Saturday was allowed to be proven in mitigation of damages for an assault committed the following Monday.

suppression of it, if practicable, would only tend to exhibit the transaction in false and deceitful colors.<sup>1</sup> The law mercifully makes this concession to the weakness and infirmities of human nature, which subject it to uncontrollable influences [228] when under great and maddening excitement, superinduced by insult and threats. But it wholly discountenances the cruel disposition which for a long time broods over hastily and unguardedly spoken words, and seeks, when opportunity offers, to make them an excuse for brutal behavior. With such a temper it has no sympathy.<sup>2</sup> The mitigating effect of a provocation in words is spent when there has been time for reflection, and for the passion excited by it to cool. Other antecedent facts, however, may be proved in mitigation, where they are connected with the acts complained of, and afford an explanation of the motives and conduct of the defendant, and show him less culpable than he would otherwise appear. Thus where the injury is inflicted in an attempt to prevent the execution of previous threats, the defendant may prove such threats in mitigation of damages, as conducing to show that an excusable motive governed him, as well as the motives with which the other acted in the rencounter.<sup>3</sup> In a case in Maine<sup>4</sup> there was an affray between the plaintiff and one of the defendants in the afternoon. In the evening of the same day the defendant assaulted the plaintiff at his own house. It was held that the defendants might show the fact of the affray in the afternoon, but not its details, in mitigation of damages for the last assault. "It was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of the previous affray might have some weight on the question of the amount of damages recoverable,

<sup>1</sup> Cases cited in notes 5 and 6, p. 383.

<sup>2</sup> *Carson v. Singleton*, 23 Ky. L. Rep. 1626, 65 S. W. Rep. 821, quoting the text. In *Keiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 342, the text is quoted, and the rules stated are said to be sustained by the uniform cur-

rent of decisions in this country for the past three-quarters of a century. *Gaither v. Blowers*, 11 Md. 536.

<sup>3</sup> *Waters v. Brown*, 3 A. K. Marsh. 557; *Rhodes v. Bunch*, 3 McCord, 66; *McKenzie v. Allen*, 3 Strobb. 546.

<sup>4</sup> *Currier v. Swan*, 63 Me. 323.

and might legitimately be regarded as part of the transaction to be investigated in this suit." And in a case in Wisconsin<sup>1</sup> it was held in an action for an injury to the person, committed in an affray, that evidence offered should have been received that the plaintiff for several years had frequently tried to provoke a quarrel with the defendant, and on various occasions threatened his life, some of these being made to the de- [229] fendant, and all of them brought to his knowledge before the occasion in question.

The defendant may show that the parties fought by agreement;<sup>2</sup> but, the fighting being unlawful, the consent of the plaintiff does not defeat a recovery.<sup>3</sup> Where a battery proceeds from a dispute in which the parties impugn each other's veracity courts have differed as to whether the defendant may prove in mitigation that his statement in the altercation was true. Such proof has been excluded in Indiana,<sup>4</sup> but in Maryland where the parties disputed and blows ensued from questioning each other's veracity the defendant was allowed to show that he told the truth.<sup>5</sup> Proof by the plaintiff in aggravation of damages that the defendant threatened to beat him because he had circulated slanderous words concerning the defendant does not entitle the latter to give evidence that the plaintiff had in fact circulated the slander.<sup>6</sup> Some question has been raised as to the extent to which damages may be mitigated by proof of provocation in words. Judge Story said they might be reduced to nominal when the words were

<sup>1</sup> Fairbanks v. Witter, 18 Wis. 287, 86 Am. Dec. 765.

Where there has been a persistent continuation and repetition of insults for the sole purpose of exciting and irritating another, and these have been repeated from day to day, the case is not to be controlled or limited by a few hours or a single day. *Dolan v. Fagan*, 63 Barb. 73.

<sup>2</sup> *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. Rep. 630, 15 L. R. A. 853; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Logan v. Austin*, 1 Stew. 476; *Barholt v. Wright*, 45 Ohio St. 177, 4 Am. St. 535, 12 N. E. Rep. 185.

<sup>3</sup> *Shay v. Thompson*, 59 Wis. 540, 18 N. W. Rep. 473, 48 Am. Rep. 538; *Bell v. Hansley*, 3 Jones, 131; *Stout v. Wren*, 1 Hawks, 420, 9 Am. Dec. 653; *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. Rep. 333; *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260; *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801. Compare *Galbraith v. Fleming*, 60 Mich. 408, 27 N. W. Rep. 583; *Smith v. Simon*, 69 Mich. 481, 37 N. W. Rep. 518.

<sup>4</sup> *Butt v. Gould*, 34 Ind. 552.

<sup>5</sup> *Marker v. Miller*, 9 Md. 338.

<sup>6</sup> *Rochester v. Anderson*, 1 Bibb, 428.

“very gross and reprehensible and calculated from the circumstances to draw forth strong resentment.”<sup>1</sup> This has been doubted,<sup>2</sup> but it seems to be supported by authority. When the wrong is done under circumstances arising without the plaintiff’s fault, and these furnish a reasonable excuse for the violation of public order, considering the infirmities of human temper, there is no foundation for exemplary damages, but the plaintiff is entitled to compensation. But where there is a reasonable excuse for the violation of public order arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the wrong done, there can be no exemplary damages and the circumstances of mitigation must be applied to the actual damages.<sup>3</sup> Dixon, C. J.,<sup>4</sup> said: “This seems to follow as the necessary and logical result of the rule which permits exemplary damages to be recovered. Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If the malice of the defendant is to be punished by the imposition of additional damages or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct and not punish the other for the same thing; nor so unwise as not to make an allowance for the infirmities of men when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages occasioned by himself,—a result which would be contrary to every principle of reason and justice. And so I find the uninterrupted course of decision both in England and this country.”<sup>5</sup> In opposition to this view there are several dis-

<sup>1</sup> *Cushman v. Ryan*, 1 Story, 100.

<sup>2</sup> *Birchard v. Booth*, 4 Wis. 67.

<sup>3</sup> *Robison v. Rupert*, 23 Pa. 523;  
*Reed v. Bias*, 8 W. & S. 189; *Ellsworth*  
*v. Thompson*, 13 Wend. 663; *Genung*

*v. Baldwin*, 77 App. Div. 584, 79  
 N. Y. Supp. 569; *Irwin v. Porter*, 1  
*Hawaii*, 159.

<sup>4</sup> *Moreley v. Dunbar*, 24 Wis. 183.

<sup>5</sup> Citing *Robison v. Rupert*, 23 Pa.

sents including the supreme court of Wisconsin and other courts of high repute. The argument of Judge Dixon seems to the editor to be fully answered by the court of Vermont, which, like the other courts that deny that words of provocation may mitigate compensatory damages, grant that they

523; *Fraser v. Berkeley*, 7 C. & P. 621; *Millard v. Brown*, 35 N. Y. 297; *Finnerty v. Tipper*, 2 Camp. 72; *Avery v. Rae*, 1 Mass. 11; *Cushman v. Ryan*, 1 Story, 100; *Gaither v. Blowers*, 11 Md. 551, 552; *Child v. Homer*, 13 Pick. 503; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Rochester v. Anderson*, 1 Bibb, 428; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Ireland v. Elliott*, 5 Iowa, 478, 68 Am. Dec. 715; *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595; *Waters v. Brown*, 3 A. K. Marsh. 557; *Pren-tiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Rhodes v. Bunch*, 3 McCord, 65; *McKenzie v. Allen*, 3 Strobb. 546; *Matthews v. Terry*, 10 Conn. 459; *Coxe v. Whitney*, 9 Mo. 531; *Collins v. Todd*, 17 Mo. 539; *Corning v. Corning*, 6 N. Y. 103; *Willis v. Forrest*, 2 Duer, 310; *Tyson v. Booth*, 100 Mass. 258; *Marker v. Miller*, 9 Md. 338; *Bingham v. Garnault*, Buller's N. P. 17.

In *Wilson v. Young*, 31 Wis. 574, the subject was again under discussion, and a majority of the court held to a middle ground between the doctrine of *Birchard v. Booth* and *Morely v. Dunbar* — that in an action for assault and battery compensatory, as distinguished from punitive, damages are of two kinds: 1. Those which may be recovered for the actual personal or pecuniary injury and loss, the elements of which are loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance and the like. 2. Those which may be recovered for injuries to the feelings arising from the insult or

indignity, the public exposure and contumely, and the like. That compensatory damages of the *first* kind are to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language or malicious conduct on the plaintiff's part, not constituting a legal justification of the defendant's acts, cannot be considered in mitigation of such damages. That compensatory damages of the *second* kind depend entirely upon the malice of the defendant; and as evidence of such malice may be given to increase that kind of damages, so evidence of threatening and malicious words or acts on the plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even defeat such damages. The distinction above made between the kinds of compensatory damages is disapproved of in *Craker v. Chicago*, etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504.

There are other Wisconsin cases which declare that "personal abuse which may have had something to do with inducing and bringing upon another an assault may be considered by a jury in mitigation of damages. But a man commencing an assault and battery under such circumstances is liable for the actual damages which result." *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. Rep. 501; *Corcoran v. Harra*, 55 Wis. 120, 12 N. W. Rep. 468. See *Yates v. New York*, etc. R. Co., 67 N. Y. 100.

mitigate exemplary damages. "If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If in one case the provocation is so great that the jury may award only nominal damages, why, in another in which the provocation is far greater, should they not be permitted to acquit the defendant and thus overturn the well settled rule of law that words cannot justify an assault. On the other hand, if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words, and therefore, though he struck and injured the plaintiff, he was only partly in the wrong and should pay only part of the actual damages. If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question, but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another,<sup>1</sup> and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another unless done in self-defense or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act."<sup>2</sup>

The fact that the offending person in an action for assault and battery has been subjected to fine in a criminal prosecu-

<sup>1</sup> See § 16.

<sup>2</sup> *Goldsmith v. Joy*, 61 Vt. 488, 499, 17 Atl. Rep. 1010, 4 L. R. A. 500, 15 Am. St. 923; *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. Rep. 1127; *Prindle v. Haight*, 83 Wis. 50, 52 N. W. Rep. 1134; *Jacobs v. Hoover*, 9 Minn. 204; *Cushman v. Waddell*, 1 Baldwin, 57;

*McBride v. McLaughlin*, 5 Watts, 375; *Donnelly v. Harris*, 41 Ill. 136; *Gizler v. Witzel*, 82 Ill. 322; *Johnson v. McKee*, 27 Mich. 471; *Prentiss v. Shaw*, 56 Me. 712; *Mangold v. Oft*, 63 Neb. 397, 88 N. W. Rep. 507; *Armstrong v. Rhoades* (Del.), 53 Atl. Rep. 435.

tion does not bar or mitigate his liability to exemplary<sup>1</sup> or compensatory<sup>2</sup> damages in a civil action. This question will be more fully considered in the chapter on exemplary damages.<sup>3</sup> The character of the party assaulted cannot affect the damages which he is entitled to recover;<sup>4</sup> nor can proof be made of the generally peaceable character of the defendant to rebut malice or mitigate the damages.<sup>5</sup>

Immediately after the civil war the plaintiff, having [231] publicly and indecently exulted over the assassination of President Lincoln, was arrested, pursuant to a general order of the defendant as commander of a military department. The order was illegal but was issued without malice and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages for his arrest and imprisonment, but, having been manacled and compelled to labor with other prisoners during the time he was held in custody, these circumstances were held to be good ground for enhancement of the damages.<sup>6</sup>

§ 152. **Provocation in libel and slander.** In actions for libel or verbal slander it may be proved in mitigation that there was an immediate provocation in the acts and declarations of the plaintiff.<sup>7</sup> The defendant cannot, however, prove such acts and declarations done or made at a different time or any antecedent facts which are not fairly to be considered part of the same transaction, however irritating and provoking they may be.<sup>8</sup> It has been held that a criminary retort made

<sup>1</sup> *Hoodley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Cook v. Ellis*, 6 Hill, 466, 41 Am. Dec. 757; *McWilliams v. Bragg*, 3 Wis. 424; *Brown v. Swineford*, 44 id. 282, 28 Am. Rep. 582; *Wilson v. Middleton*, 2 Cal. 54; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285. *Contra*, *Smithwick v. Ward*, 7 Jones, 64, 75 Am. Dec. 453. See § 402 and ch. 26.

<sup>2</sup> *Id.*; *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. Rep. 1079.

<sup>3</sup> Ch. 9.

<sup>4</sup> *Corning v. Corning*, 6 N. Y. 97, 104; *Smithwick v. Ward*, 7 Jones, 64; *Ward v. State*, 28 Ala. 53. See § 94.

<sup>5</sup> *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. Rep. 1079.

<sup>6</sup> *McCall v. McDowell*, Deady, 233; *Roth v. Smith*, 54 Ill. 431.

<sup>7</sup> *Miles v. Harrington*, 8 Kan. 425; *Jauch v. Jauch*, 50 Ind. 135; *Beardsley v. Maynard*, 4 Wend. 336; *Moore v. Clay*, 24 Ala. 235, 60 Am. Dec. 461; *Powers v. Presgroves*, 38 Miss. 227; *McClintock v. Crick*, 4 Iowa, 453; *Duncan v. Brown*, 15 B. Mon. 186; *Ranger v. Goodrich*, 17 Wis. 78; *Freeman v. Tinsley*, 50 Ill. 497; *Mousler v. Harding*, 33 Ind. 176, 5 Am. Rep. 195.

<sup>8</sup> *Hamilton v. Eno*, 81 N. Y. 116; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230.

after three days is not part of the same transaction, nor when it has no relation to the previous publication and there is no [232] perceptible connection between them.<sup>1</sup> It has also been held that where a party is sued for republishing a libelous article in a newspaper, and the republication is accompanied by remarks tending to a justification of the article, but not amounting to it, the defendant is not permitted to prove the truth of the remarks in mitigation of damages because the evidence would tend to prove the charge well founded; that evidence in mitigation must be such as admits the charge to be false.<sup>2</sup> The defendant may show that he was drunk or insane when he spoke the words.<sup>3</sup>

Upon common principles the general issue in an action on the case for slander would put in issue, not only the speaking of the slanderous words, but their alleged falsity and the malice. The early adjudications were in harmony with this view, but upon consultation of the judges in England about one hundred and seventy years ago it was resolved that in the future, if the defendant intend to justify, he shall plead his justification that the plaintiff may know what he has to meet.<sup>4</sup> The rule then promulgated has ever since prevailed in England and has been followed in this country.<sup>5</sup> It has also ensued that, under the general issue in such actions, the defendant cannot prove the truth of the words spoken either to rebut malice or mitigate damages.<sup>6</sup> It has been deemed as important that the plaintiff should have notice that the truth of the

<sup>1</sup> Beardsley v. Maynard, 4 Wend. 336. See Graves v. State, 9 Ala. 448; Maynard v. Beardsley, 7 Wend. 560; Lister v. Wright, 2 Hill, 320; Underhill v. Taylor, 2 Barb. 348; Richardson v. Northrup, 56 Barb. 105.

<sup>2</sup> Cooper v. Barber, 24 Wend. 105.

<sup>3</sup> Howell v. Howell, 10 Ired. 84; Gates v. Meredith, 7 Ind. 440; Jones v. Townsend, 21 Fla. 431, 57 Am. Rep. 171. *Contra*, Mix v. McCoy, 22 Mo. App. 488.

<sup>4</sup> Underwood v. Parker, 2 Strange, 1200.

<sup>5</sup> Bodwell v. Swan, 3 Pick. 376; Knight v. Foster, 39 N. H. 576; Tay-

lor v. Robinson, 29 Me. 323; Kay v. Fredrigal, 3 Pa. 221; Jarnigan v. Fleming, 43 Miss. 710; Douge v. Pearce, 13 Ala. 127; Henson v. Veatch, 1 Blackf. 369; Gilman v. Lowell, 8 Wend. 573; Wagstaff v. Ashton, 1 Harr. 503; Snyder v. Andrews, 6 Barb. 43; Shirley v. Keathy, 4 Cold. 29; Barns v. Webb, 1 Tyler, 17; Updegrove v. Zimmerman, 13 Pa. 619; Root v. King, 7 Cow. 613; Swift v. Dickerman, 31 Conn. 285.

<sup>6</sup> Knight v. Foster, 39 N. H. 576; Bailey v. Hyde, 3 Conn. 463; Swift v. Dickerman, 31 Conn. 291; Shepard v. Merrill, 13 Johns. 475.



words is intended to be proved when the purpose is mitigation of damages, as when the proof is intended for any other object.<sup>1</sup> In some jurisdictions, therefore, the defendant has been precluded from all proof under the general issue which [233] implies the truth of the charge or tends to prove it.<sup>2</sup> To get the opportunity to adduce any such proof he was required to plead the truth of the words as a justification; then if he succeeded he was exonerated from all liability; but if he failed, the plea, being a repetition of the defamatory words, aggravated the damages, for malice was conclusively presumed.<sup>3</sup> In New York by such an unsustained plea the defendant was held to admit the malice on his part, and he could not resort to any defense based on its absence.<sup>4</sup> While he had technically a right to introduce evidence in mitigation, still without a plea of justification he could establish no fact which would show that he had good reason to believe the charge to be true when the words were spoken, and if he put in the only plea which would give him a right to introduce such proof he lost the benefit of it by the stubborn presumption of malice unless his proof was sufficient to establish the truth of the charge. There was therefore very little scope for mitigation in that class of actions.<sup>5</sup> The injustice of such a rule induced the courts in some of the states, as well as in England, to admit proof of facts and circumstances tending to show the truth of the words spoken, but falling short of proving it; in other words, the defendant might show that he had reason to believe

<sup>1</sup> *Wolcott v. Hall*, 6 Mass. 514, 4 Am. Dec. 173; *Jarnigan v. Fleming*, 43 Miss. 710; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

<sup>2</sup> *Gilman v. Lowell*, 8 Wend. 573; *Knight v. Foster*, 39 N. H. 576; *Moyer v. Pine*, 4 Mich. 409; *Regnier v. Cabot*, 7 Ill. 34; *McAlexander v. Harris*, 6 Munf. 465; *Porter v. Botkins*, 59 Pa. 484; *Chamberlin v. Vance*, 51 Cal. 75; *Pease v. Shippen*, 80 Pa. 513, 21 Am. Rep. 116; *Wormouth v. Cramer*, 3 Wend. 395, 20 Am. Dec. 706; *McGee v. Sodusky*, 5 J. J. Marsh. 185, 20 Am. Dec. 251.

If the plaintiff puts in evidence a fact not pleaded tending to create

an inference of express malice the defendant may rebut that inference by explanatory evidence. *Reiley v. Timme*, 53 Wis. 63, 10 N. W. Rep. 5.

<sup>3</sup> *Id.*; *Gorman v. Sutton*, 32 Pa. 247; *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185; *Robinson v. Drummond*, 24 Ala. 174; *Pool v. Devers*, 30 Ala. 672; *Downing v. Brown*, 3 Colo. 571; *Cavanaugh v. Austin*, 42 Vt. 576.

<sup>4</sup> *Gilman v. Lowell*, 8 Wend. 573; *Purple v. Horton*, 13 id. 9, 27 Am. Dec. 167; *Fero v. Ruscoe*, 4 N. Y. 162.

<sup>5</sup> See *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 id. 67.

when he uttered the words that they were true.<sup>1</sup> Under this rule it has been allowed to be proved that there were reports [234] in the neighborhood that the plaintiff had been guilty of practices similar to those imputed to him,<sup>2</sup> or that general reports that he was guilty of the very offense were, previously to the speaking of the words, in circulation.<sup>3</sup> But the defendant to mitigate damages and repel the presumption of malice cannot give in evidence facts of which he was ignorant at the time of uttering the words complained of.<sup>4</sup> The fact that reports were in circulation prior to the uttering of the words, to the effect that plaintiff was guilty of the offense imputed to him cannot generally be proven in mitigation in courts which admit proof which is not full justification but which tends to show the truth of the words spoken.<sup>5</sup> The general character of the plaintiff at the time the defamatory words were spoken is uniformly deemed in issue, for it is the foundation of his claim for damages, and he is at all times, with-

<sup>1</sup> *Knobell v. Fuller, Norris' Peake* Add. Cas. 32; ——— *v. Moor*, 1 M. & S. 285; *Leicester v. Walter*, 2 Camp. 251; *East v. Chapman*, 2 C. & P. 570; *Bailey v. Hyde*, 3 Conn. 463, 8 Am. Dec. 202; *Bridgman v. Hopkins*, 34 Vt. 532; *Williams v. Miner*, 18 Conn. 464; *Haywood v. Foster*, 16 Ohio, 88; *Wagner v. Holbrunner*, 7 Gill, 296; *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66; *Rigden v. Wolcott*, 6 Gill & J. 413; *Morris v. Barker*, 4 Harr. 520; *Galloway v. Courtney*, 10 Rich. 414; *Williams v. Cawley*, 18 Ala. 206; *Brown v. Brooks*, 3 Ind. 518; *Wilson v. Apple*, 3 Ohio, 270; *Minesinger v. Kerr*, 9 Pa. 312; *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Farr v. Rasco*, 9 Mich. 353, 80 Am. Dec. 88.

<sup>2</sup> ——— *v. Moor*, 1 M. & S. 285. See ch. 34.

<sup>3</sup> *Calloway v. Middleton*, 2 A. K. Marsh. 372, 12 Am. Dec. 409; *Kennedy v. Gregory*, 1 Bin. 85; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Case v. Marks*, 20 Conn. 248; *Bridgman v. Hopkins*, 34 Vt. 532;

*Blickenstaff v. Perrin*, 27 Ind. 527; *Morris v. Barker*, 4 Harr. 520; *Henson v. Veatch*, 1 Blackf. 369; *Church v. Bridgman*, 6 Mo. 190; *Easterwood v. Quin*, 2 Brev. 64, 3 Am. Dec. 700; *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632; *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343; *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Bowen v. Hall*, 20 Vt. 232; *Fletcher v. Burroughs*, 10 Iowa, 557; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Kimball v. Fernandez*, 41 Wis. 329. See ch. 34.

<sup>4</sup> *Bailey v. Hyde*, 3 Conn. 463, 8 Am. Dec. 202; *Hatfield v. Lasher*, 81 N. Y. 246; *Willower v. Hill*, 72 id. 36; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. Rep. 307, 5 Am. St. 413; *Whitney v. Janesville Gazette*, 5 Biss. 330; *Edwards v. Kansas City Times Co.*, 32 Fed. Rep. 813.

<sup>5</sup> *Anthony v. Stephens*, 1 Mo. 254; *Fisher v. Patterson*, 14 Ohio, 418; *Wilson v. Fitch*, 41 Cal. 363; *Bush v. Prosser*, 11 N. Y. 347, 361. See *Bowen v. Hall*, 20 Vt. 232.

out special notice in the pleadings, supposed to be prepared to sustain it against any attack.<sup>1</sup>

**153. Same subject.** It is held in Michigan that where only the general issue is pleaded and evidence is offered in mitigation tending to show the truth of the words spoken, the offer conclusively admits that the charge was false though at the time the defendant made it he believed it to be true. [235] Such an offer, under such pleadings, should be treated as involving a disclaimer of the truth of the words and a conclusive admission that they were not true; but not as inconsistent with the idea that the defendant at the time he uttered them may have believed them to be true. He therefore has a right to introduce any facts and circumstances tending to show grounds for such belief at the time of the speaking of the words.<sup>2</sup> The same doctrine is held in Ohio. The whole reason of the rule for admitting such evidence is to relieve the defendant from the consequences which attach to *malice* in the speaking of the words. He may show particular acts of the plaintiff which, unexplained, gave him a just reason to believe the truth of the declarations which he uttered; but which, when explained and understood, may be found to be compatible with the plaintiff's innocence. This is permitted upon the ground that the proof when introduced may serve to show that the defendant was mistaken in making the charge, that he misconstrued the act or conduct of the party by supposing it to be criminal, while in fact it was not. When the testimony can have no other effect than to make apparent the plaintiff's guilt and prove the truth of the words spoken, its introduction to the jury must tend to justify the speaking; not to mitigate damages by showing the absence of malice. To be competent for the former purpose the facts relied on must be pleaded spe-

<sup>1</sup> Buford v. McLuny, 1 N. & McC. 268; Sawyer v. Eifert, 2 id. 511, 10 Am. Dec. 633; Douglass v. Tousey, 2 Wend. 352; Hamer v. McFarlin, 4 Denio, 509; Pallet v. Sargent, 36 N. H. 496; Sanders v. Johnson, 6 Blackf. 53; Rhodes v. Ijams, 7 Ala. 574; Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173; Moyer v. Moyer, 49 Pa. 210; Alderman v. French, 1 Pick. 1; Bod-

well v. Swan, 3 id. 376; McNutt v. Young, 8 Leigh, 542; Dewit v. Greenfield, 5 Ohio, 225; Fitzgerald v. Stewart, 53 Pa. 343; Powers v. Presgroves, 38 Miss. 227; Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821; Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. Rep. 657.

<sup>2</sup> Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66.

cially and cannot be given in evidence under the general issue.<sup>1</sup>

The rule has been far from universal that an unsustained plea of justification shall in all cases be deemed proof of malice or have the effect to exclude evidence of the absence thereof. Where a plea of justification is interposed without any expectation of sustaining it, there is no reason why such deliberate repetition of the slander should not be taken into consideration in the assessment of damages. But it has not been deemed just to hamper a *bona fide* defense with the hazard of such a consequence as matter of law. Perley, C. J., said: "If he believed when he spoke the words that they were true, and makes a *bona fide* defense to the action under the plea of justification, [236] we do not see why he should make it under the penalty of being punished by increased damages if he should fail to satisfy the jury of the fact any more than in other cases where a defendant does not succeed in a *bona fide* defense. We think it should be left to the jury to decide the weight and character of the evidence introduced in support of the plea and the manner and spirit in which the defense is conducted; whether the real object of the plea and evidence was to defend the action with reasonable expectation of success or to repeat the original slander."<sup>2</sup>

These principles have now been established by statute in many states where the harsher rule formerly prevailed. In New York, as well as in many other jurisdictions having codes, it is provided that the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not he may give evidence of such circumstances. This statute does not mean that he must connect them together, that he cannot allege one without the other; but that he should not be prohibited from alleging either;

<sup>1</sup> Reynolds v. Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Wilson v. Apple, 3 Ohio, 270; Dewit v. Greenfield, 5 Ohio, 225; Haywood v. Foster, 16 Ohio, 88.

<sup>2</sup> Pallet v. Sargent, 36 N. H. 496; Byrket v. Monohon, 7 Blackf. 83, 41

Am. Dec. 212; Chalmers v. Shackell, 6 C. & P. 475; Sanders v. Johnson, 6 Blackf. 50, 36 Am. Dec. 564; Thomas v. Dunaway, 30 Ill. 373; Cummerford v. McAvoy, 12 Ill. 311; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 93; Rayner v. Kinney, 14 Ohio St. 283.

accordingly the defendant, without pleading the truth of the words spoken, may allege facts tending to establish their truth and prove such facts in mitigation.<sup>1</sup> If a plea of justification or in mitigation is interposed in bad faith, and for the purpose of injuring the plaintiff's reputation, the fact may be considered by the jury.<sup>2</sup>

§ 154. **Mitigating circumstances in trespass and other actions.** In trespass for levying on the plaintiff's property under an execution against a third party the defendant may show in mitigation of damages on a writ of inquiry, after judgment by default, that at and prior to the levy the property was in his possession, or that the plaintiff was not the owner; but he is estopped by the judgment from showing that the plaintiff had not such interest as would entitle him to maintain the suit.<sup>3</sup> Where a building was blown up without authority to [237] stay the progress of a conflagration, the fact was allowed to be shown; and the jury in estimating the damages, it was held, should consider the circumstances under which the building and its contents were and their chance of being saved, even though not at the time on fire, and should determine the damages with reference to the peril to which they were exposed.<sup>4</sup> So if a landlord enters to make repairs which are necessary and which the tenant ought to have made, but neglected to make, or if he enters to make repairs which he is bound to make, but which the tenant forbids him to make, the damages will be estimated with reference to these circumstances and will be less than if the entry were made without color of excuse.<sup>5</sup> A person sued for entering and cutting down trees may show in mitigation a verbal license from the plaintiff,<sup>6</sup> or, when sued for breach of a contract, that performance would have been useless.<sup>7</sup> In actions for false imprisonment or ma-

<sup>1</sup> *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 N. Y. 67.

<sup>2</sup> *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457; *Distin v. Rose*, 69 N. Y. 122; *Bennett v. Matthews*, 64 Barb. 410. See *Doe v. Roe*, 32 Hun, 628.

<sup>3</sup> *Sterrett v. Kaster*, 37 Ala. 366; *Squire v. Hollenbeck*, 9 Pick. 551, 20

Am. Dec. 506; *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436.

<sup>4</sup> *Parsons v. Pettingell*, 11 Allen, 507; *Reed v. Bias*, 8 W. & S. 189. See *Workman v. Great Northern R. Co.*, 32 L. J. (Q. B.) 279.

<sup>5</sup> *Reeder v. Purdy*, 41 Ill. 279.

<sup>6</sup> *Wallace v. Goodall*, 18 N. H. 439.

<sup>7</sup> *Louisville & P. Canal Co. v. Rowan*, 4 Dana, 606.

licious prosecution the fact that the defendant acted under instructions of his employer will not mitigate damages.<sup>1</sup> The advice of counsel, if given *bona fide*, is a circumstance which may be considered to disprove malice and mitigate exemplary damages,<sup>2</sup> if it was given on a full disclosure of the facts.<sup>3</sup> The damages recoverable for the breach of a marriage promise are not lessened because the defendant withdrew his affections from the plaintiff without cause.<sup>4</sup> Any act done, no matter by whom, by which the injury resulting from a trespass is put an end to or mitigated may be proved.<sup>5</sup>

§ 155. **Plaintiff's acts and negligence.** The acts and negligences of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damages. The defendant is liable for the natural and proximate consequences of his violations of contract and of his unlawful acts; but if the plaintiff has rendered these consequences more severe to himself by some voluntary act from which it was his duty to refrain, or if by his neglect to exert himself reasonably to limit the injury and prevent damage, in the cases in which the law imposes that duty, and thereby he suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff.<sup>6</sup> If he omit to use his opportunities and [238] does not reasonably exert himself to lessen the damages which may result from such act he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power.<sup>7</sup> The measure of his duty in this regard

<sup>1</sup> Josselyn v. McAllister, 22 Mich. 300.

<sup>2</sup> Fox v. Davis, 55 Ga. 298; Bohm v. Dunphy, 1 Mont. 333.

<sup>3</sup> Shores v. Brooks, 81 Ga. 468, 18 Am. St. 332, 8 S. E. Rep. 429. See ch. 25.

<sup>4</sup> Richmond v. Roberts, 98 Ill. 472.

<sup>5</sup> Alabama Midland R. Co. v. Coskry, 92 Ala. 254, 9 So. Rep. 202.

<sup>6</sup> Boggess v. Metropolitan Street R.

Co., 118 Mo. 328, 23 S. W. Rep. 159, quoting the text.

<sup>7</sup> Id.; Dietrich v. Hannibal & St. J. R. Co., 89 Mo. App. 36; Kumberger v. Congress Spring Co., 158 N. Y. 339, 345, 53 N. E. Rep. 3; Warren v. Stoddart, 105 U. S. 224; Goshen v. England, 119 Ind. 368, 21 N. E. Rep. 977, 5 L. R. A. 253; Louisville, etc. R. Co. v. Jones, 108 Ind. 551, 9 N. E. Rep. 476; Sherman Center Town Co. v.

is ordinary care and diligence.<sup>1</sup> "To require one who has been injured to take proper and immediate steps to prevent future consequences is demanding of him a degree of care and an infallibility of judgment which the most skilful physician does not possess."<sup>2</sup> "An injured person who, from the circumstances, might reasonably believe that her injury was of a character that rest alone would afford a speedy recovery from, should not be required to incur the heavy expenses of nursing and medical attendance as a condition to her right of recovery of adequate damages."<sup>3</sup> If an injured person selects and uses all reasonably accessible means to cure his hurt and, for a time upon his own judgment and without medical advice, adopts and pursues such treatment as a physician of ordinary care, prudence and skill uses in treating a similar injury, his duty is fully discharged, though it appears that a more skilful treatment might have produced a more favorable result.<sup>4</sup> The rule which requires reasonable conduct on the part of one whose

- Leonard, 46 Kan. 354, 26 Am. St. 101, 26 Pac. Rep. 717; Miller v. Mariners' Church, 7 Me. 51, 20 Am. Dec. 341; Mather v. Butler County, 28 Iowa, 253; Maynard v. Maynard, 49 Vt. 297; Arden v. Goodacre, 11 C. B. 371; Howard v. Daly, 61 N. Y. 363, 19 Am. Rep. 285; Sutherland v. Wyer, 67 Me. 64; Williams v. Chicago Coal Co., 60 Ill. 149; Benziger v. Miller, 50 Ala. 206; Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177; Keyes v. Western Vermont Slate Co., 34 Vt. 81; Cook v. Soule, 56 N. Y. 420; Campbell v. Miltenberger, 26 La. Ann. 72; Parsons v. Sutton, 66 N. Y. 92; Bisher v. Richards, 9 Ohio St. 495; Dobbins v. Duquid, 65 Ill. 464; Hayden v. Cabot, 17 Mass. 169; Emery v. Lowell, 109 Mass. 197; True v. International Tel. Co., 60 Me. 9; Grindle v. Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31; Luse v. Jones, 39 N. J. L. 707; United States v. Smith, 94 U. S. 214; Beymer v. McBride, 37 Iowa, 114; Le Blanche v. London, etc. R. Co., 1 C. P. Div. 286; Hamlin v. Great Northern R. Co., 1 H. & N. 408; Smeed v. Foord, 1 E. & E. 602; Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. Rep. 1053; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. Rep. 749; Loomer v. Thomas, 38 Neb. 277, 56 N. W. Rep. 973; Packet Co. v. Hobbs, 105 Tenn. 29, 45, 58 S. W. Rep. 278; Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 91 Fed. Rep. 213, citing the text; Friedenstien v. United States, 35 Ct. of Cls. 1; Bickham v. Hutchinson, 50 La. Ann. 765, 23 So. Rep. 902; Gooden v. Moses, 99 Ala. 230, 13 So. Rep. 765; Raymond v. Haverhill, 168 Mass. 382, 47 N. E. Rep. 101. Compare Wieting v. Millston, 77 Wis. 523, 46 N. W. Rep. 879, which is disapproved in the Massachusetts case.
- <sup>1</sup> Louisville, etc. R. Co. v. Falvey, 104 Ind. 409, 4 N. E. Rep. 908.
- <sup>2</sup> Fullerton v. Fordyce, 144 Mo. 519, 533, 44 S. W. Rep. 1053.
- <sup>3</sup> Kennedy v. Busse, 60 Ill. App. 440. See Williams v. Brooklyn, 33 App. Div. 539, 53 N. Y. Supp. 1007.
- <sup>4</sup> Packet Co. v. Hobbs, 105 Tenn. 29, 44, 58 S. W. Rep. 278.

legal rights have been violated should not be invoked by a defendant as a basis for a critical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which were wiser or more advantageous to the defendant. Reasonably prudent action is required; not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.<sup>1</sup>

In some states contributory negligence to a certain extent is not a defense if the defendant was also at fault. There such negligence diminishes the damages which the plaintiff may recover,<sup>2</sup> except where the defendant has been responsible for a positive, continuous tort.<sup>3</sup> In Tennessee the plaintiff's negligence may be considered in mitigation whether the defendant's conduct has been merely negligent or reckless and wanton.<sup>4</sup> The rule requiring the wronged party to lessen the damage done has been held not to apply to a case of wilful injury. "Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might, by the use of due care, have avoided the battery, we think where the injury is intentional he should not be permitted to say in reduction of damages that the plaintiff might have prevented them at least in part by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was wilful, by a parity of reasoning, the defendant in such a case should not be permitted to say that, but for the negligence of the defendant in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery."<sup>5</sup>

<sup>1</sup> The Thomas P. Sheldon, 113 Fed. Rep. 779, 781.

<sup>2</sup> Atlanta, etc. R. Co. v. Wyly, 65 Ga. 120; Hardin v. Ledbetter, 103 N. C. 90, 9 S. E. Rep. 641; East Tennessee, etc. R. Co. v. Fain, 12 Lea, 35; Louisville & N. R. Co. v. Conner, 2 Bax. 382; East Tennessee, etc. R. Co. v. Thompson, 12 Lea, 200; Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. Rep. 116.

<sup>3</sup> Satterfield v. Rowan, 83 Ga. 187, 9 S. E. Rep. 677.

<sup>4</sup> Railway Co. v. Wallace, 90 Tenn. 52, 62, 15 S. W. Rep. 921.

<sup>5</sup> Galveston, etc. R. Co. v. Zantinger, 92 Tex. 365, 44 L. R. A. 553, 48 S. W. Rep. 563, 71 Am. St. 859. The general subject of mitigation, or preventable damages, has been considered in §§ 88-90.



**§ 156. Measures of prevention; return of property; discharge of plaintiff's debt.** Acts of the plaintiff or the defendant, and in some cases of third persons, by which the *prima facie* loss or injury from the act complained of has been reduced or partially compensated may be shown in reduction of damages. Measures of prevention taken by the plaintiff to prevent loss or to avert some of the consequences of the wrong complained of, and which have had an ameliorating effect, may be proved; and the damages will be mitigated, according to the particular facts, to the actual loss. Where goods have been taken from the owner, and sold by an officer who cannot justify for want of a plea or because his writ would not avail for that purpose, such officer or any person liable for his tort may show that the plaintiff bought the goods at the tortious sale for less than their value.<sup>1</sup>

Whenever the owner recovers his property after any [239] wrongful taking or detention the expense of procuring its return is the measure of damages, in the absence of special damage, if the property itself has not been injured or diminished in value. In other words, the wrong-doer is *prima facie* liable for the value of property at the time he tortiously took or converted it, with interest; but if it has been returned and accepted by the owner its value then, or, if he has incurred expense to recover it, then its value less such expense, will be deducted by way of mitigation from the amount which would otherwise be the measure of damages.<sup>2</sup> Where one recovers

<sup>1</sup> Forsyth v. Palmer, 14 Pa. 96, 53 Am. Dec. 519; Murray v. Burling, 10 Johns. 175; Baker v. Freeman, 9 Wend. 36, 24 Am. Dec. 117; Ford v. Williams, 24 N. Y. 359; Baldwin v. Porter, 12 Conn. 473; Hurlburt v. Green, 41 Vt. 490; McInroy v. Dyer, 47 Pa. 118; Tamvaco v. Simpson, H. & R. 374; Kaley v. Shed, 10 Met. 317; Sprague v. Brown, 40 Wis. 612; Reynolds v. Shuler, 5 Cow. 323.

<sup>2</sup> Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733; Dailey v. Crowley, 5 Lans. 301; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Pierce v. Benjamin, 14 Pick. 356; Lucas v. Trumbull, 15 Gray, 306; Perkins v. Freeman, 26 Ill. 477; Hallett v. Novion, 14 Johns. 273; Delano v. Curtis, 7 Allen, 470; Cook v. Hartle, 8 C. & P. 568; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Burn v. Morris, 2 Crompt. & M. 579; Doolittle v. McCullough, 7 Ohio St. 299; Wheelock v. Wheelwright, 5 Mass. 104; Cook v. Loomis, 26 Conn. 483; Hepburn v. Sewell, 5 Har. & J. 211, 9 Am. Dec. 512; Sprague v. Brown, 40 Wis. 612; Ewing v. Blount, 20 Ala. 694; Hurlburt v. Green, 41 Vt. 490; Johansson v. Borschenius, 35 Wis. 181;

property which had been unlawfully taken he is considered as having accepted it in mitigation of damages upon the principle that he has thereby received partial compensation for the injury suffered.<sup>1</sup> In an action of trespass for goods taken and carried away it appeared that the plaintiff, before suing, had demanded their return, and the defendant had promised to return them, but while preparing to do so they were attached on a writ against the plaintiff; it was held that the measure of damages was the same as though the defendant had returned them.<sup>2</sup> If restoration is obtained by the offer and payment of a reasonable reward this amount, with interest from the time of payment, is to be deducted from the value of the property returned.<sup>3</sup> Trouble and loss of time may be taken into consideration as part of the expense of obtaining restoration.<sup>4</sup> Where there is a diminution in value from any cause [240] intermediate the taking or conversion and return, the loss falls on the wrong-doer, and will lessen the mitigation to which he is entitled because of the return of the property.<sup>5</sup> A mere offer to return will not lessen the damages;<sup>6</sup> nor will the tender of part of the value by an officer who has sold under a void process.<sup>7</sup> A court may in a proper case, if the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages, which will then be reduced to those actually sustained by the taking, with intervening costs and losses.<sup>8</sup> In an action for damages for

Blewett v. Miller, 131 Cal. 149, 63 Pac. Rep. 157, quoting the text; First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. Rep. 539, citing the text.

<sup>1</sup> Muenster v. Fields, 89 Tex. 102, 33 S. W. Rep. 852, affirming Fields v. Muenster, 32 S. W. Rep. 417, quoting the text; Kline v. McCandless, 139 Pa. 223, 20 Atl. Rep. 1045; Fields v. Williams, 91 Ala. 502, 8 So. Rep. 808; Dodson v. Cooper, 37 Kan. 346, 15 Pac. Rep. 200, quoting the text; Sgrague v. Brown, 40 Wis. 612; Lazarus v. Ely, 45 Conn. 504; First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. Rep. 539, citing the text; Merrill v. How, 24 Me. 126.

<sup>2</sup> Kaley v. Shed, 10 Met. 317; Lowell v. Parker, id. 309, 43 Am. Dec. 436.

<sup>3</sup> Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268.

<sup>4</sup> Johannesson v. Borschenius, 35 Wis. 131.

<sup>5</sup> Lucas v. Trumbull, 15 Gray, 306; Perham v. Coney, 117 Mass. 102; Barrelett v. Bellgard, 71 Ill. 280; First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. Rep. 539.

<sup>6</sup> Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352. See Worman v. Kramer, 73 Pa. 378; Dow v. Humbert, 91 U. S. 294.

<sup>7</sup> Clark v. Hallock, 16 Wend. 607.

<sup>8</sup> Yale v. Saunders, 16 Vt. 243.

withholding or not conveying property, a tender of it or a part of it or a conveyance of the whole or a portion of it may be allowed at the trial in mitigation, if under the circumstances such a course is reasonable.<sup>1</sup> But this cannot be done in actions of *assumpsit* for breach of contract.<sup>2</sup> By a wrongful conversion of property a cause of action arises which cannot be discharged except by the owner's act.<sup>3</sup> And his acceptance of a return of it is in general required to relieve the wrongdoer of any part of his liability for the value; but as damages in trover are assessed on equitable principles, as is the allowance of mitigations generally, if property wrongfully taken or its proceeds have been applied to the payment of the plaintiff's debts, or otherwise to his use, though without his direction or consent, such application may, under certain circumstances, be received in mitigation. An executor *de son tort* may show that he has applied the proceeds of the property with which he intermeddled in payment of the debts of the deceased.<sup>4</sup>

§ 157. **Same subject.** Where a guardian, having no power to commit waste by cutting and removing timber, unauthorizedly gave a license to another to commit such waste, and the latter, with the former's assent, applied the proceeds of the timber to the payment of taxes upon or debts against the infant's estate, such payments were allowed to be shown by him in mitigation.<sup>5</sup> But it has been held that a voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful representative, cannot show in mitigation of damages that since his purchase the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.<sup>6</sup> A defendant in an action of trespass *de bonis*

<sup>1</sup> Towle v. Lawrence, 59 N. H. 501.

<sup>2</sup> Colby v. Reed, 99 U. S. 560.

<sup>3</sup> Livermore v. Northrup, 44 N. Y. 107; Franke v. Eby, 50 Mo. App. 579; Clark v. Brott, 71 Mo. 475.

<sup>4</sup> Mountford v. Gibson, 4 East, 441; Saam v. Saam, 4 Watts, 432; Hostler v. Scott, 2 Haywood, 179; Cook v. Sanders, 15 Rich. 63, 94 Am. Dec. 136; Hanson v. Herrick, 100 Mass. 323; Perry v. Chandler, 2 Cush. 237.

<sup>5</sup> Probate Court v. Bates, 10 Vt. 285; Torry v. Black, 58 N. Y. 185.

<sup>6</sup> Carpenter v. Going, 20 Ala. 587. In this case Dargan, C. J., said: "But the question is, can the purchaser from the executor *de son tort* be substituted to this equitable defense that the executor *de son tort* might himself make? We think he cannot, at least in a court of law. We do not intend to deny the common say-

*asportatis* who is a mere trespasser cannot take any benefit from the application to the plaintiff's use of property seized by him without the latter's express or implied authority or consent, although a lien held by a third party thereon is satisfied.<sup>1</sup> "One who has wrongfully taken property cannot mitigate the damages by showing that he has himself applied the property to the owner's use without his consent; but when the property has been so applied by the act of a third person and the operation of law, that fact should be taken into the account in estimating the plaintiff's damages."<sup>2</sup> In trover by the mortgagee of crops against a purchaser with notice, or in a special action for damages in the nature of trover, the unauthorized sale and conversion being admitted, the defendant cannot prove in mitigation of damages that a part of the proceeds of the sale received by the mortgagor was applied by him to the discharge of a lien for rent which was superior to the mortgage.<sup>3</sup>

ing that trover is an equitable action and that the plaintiff can recover damages only to the extent of the injury actually sustained; as if the mortgagee bring trover against the mortgagor he can recover only the amount of the debt; or if the goods be sold illegally to discharge a lien the owner can recover of the purchaser only the value of the goods, deducting the value of the lien. But we hold that this equity or right must be personal to the defendant himself; that is, it must have existed in him at the time he became liable to the action; or if acquired afterwards it must have been acquired by his own act; for at law he cannot be subrogated to the equities of another which have sprung up after the liability of the defendant has become perfect."

<sup>1</sup> *Bird v. Womack*, 69 Ala. 390; *McMichael v. Mason*, 13 Pa. 214 (wrongful levy by sheriff); *Dallam v. Fitler*, 6 W. & S. 323; *Hundley v. Chadick*, 109 Ala. 575, 584, 19 So. Rep. 845, citing the text, and disapproving

a statement in *City Nat. Bank v. Jeffries*, 73 Ala. 123, to the effect that if it be shown that the property attached has yielded its full value, this may be considered in mitigation of damages.

<sup>2</sup> *Higgins v. Whitney*, 24 Wend. 379.

<sup>3</sup> *Keith v. Ham*, 89 Ala. 590, 7 So. Rep. 234. The court say: Had this action been against the mortgagor, there would have been more force in the position that the damages should be mitigated, for it was his duty to discharge the landlord's lien for rent; or had the case involved the general ownership of the property, and it appeared that the fruits of the conversion had been applied by the consent, express or implied, of the plaintiff, or through legal proceedings, had at the instance of a third person, to the payment of his debt, or in relieving his property from a lien, the damages recoverable by him in trover might be mitigated by the amount thus paid. *Bird v. Womack*, 69 Ala. 392; *Street v. Sin-*

Where a tax collector became a purchaser at a sale [241] made by him the sale was declared voidable in trover against him; but as the proceeds were applied to pay the plaintiff's tax the amount so paid was deducted from the damages.<sup>1</sup> So a sale by a sheriff without giving notice has been held a conversion, but the damages should be only the diminution of price caused by such omission.<sup>2</sup> If goods are tortiously taken and a creditor of the owner afterwards attaches and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking but in mitigation of damages. This is because it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts, and afterwards recover

clear, 71 id. 110. Or, had a recovery been had in favor of the landlord against the defendant, it may be that evidence of that fact might go in reduction of the mortgagee's damages. But here, even conceding that the payment was in some sort to the advantage of the plaintiff, we cannot conceive how that fact will avail the defendant in this action, the *gravamen* of which is the wrongful purchase and possession. The wrong was fully consummated, the injury resulting from it had been sustained, and the plaintiff's right to sue had attached before the alleged payment to the landlord. The payment was not made by the defendant, but by the mortgagor. To hold that he is entitled to a credit for the amount would be to subrogate him to an equity created, if it exists at all, by an act with which he had no connection and to give him the benefit of a payment which he has not made.

If personal property is sold under a condition that the title shall be and remain in the vendor until a note given for the purchase price of it is fully paid, a purchaser of a part of such property who is chargeable

with notice of the contract is liable to the original vendor for the value of the property purchased, and cannot claim a mitigation of the damages because the money he paid his vendor was by him paid to the owner and indorsement thereof made on the note he held. The person in whom was the title had a right to the whole security until his demand was fully paid. That was not affected by the diminution of the debt by payments. Defendant's vendor had no right to dispose of the property in order to make a payment. The wrong to the plaintiff, resulting from the sale and conversion, was to diminish his security. If the proceeds of the property sold had paid the whole debt, there would be good reason for mitigating the damages, although the sale took place before the debt was paid; but under the facts the mitigation would not benefit the plaintiff because, though the debt due him was lessened, he had lost an equivalent amount of property. *Morgan v. Kidder*, 55 Vt. 367.

<sup>1</sup> *Pierce v. Benjamin*, 14 Pick. 356.

<sup>2</sup> *Wright v. Spencer*, 1 Stewart, 576, 18 Am. Dec. 76.

that value from another who has derived no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority.<sup>1</sup> It is not the fact [242] of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had or

<sup>1</sup> Scanlan v. Guiling, 63 Ark. 540, 39 S. W. Rep. 713; Curtis v. Ward, 20 Conn. 204.

In the last case Ward, an attaching creditor, and the officer who executed the writ, were defendants. Ward sued out an attachment and attached property, after which that writ was abandoned and the indorsement of service erased. Subsequently a new attachment was sued out, followed by judgment and execution, on which the goods were sold. The defendant in the execution brought trover for the original taking. As the defendants could not justify that taking by any return upon the first attachment they suffered judgment by default, but they were allowed to show the subsequent disposition of the property in mitigation, on the authority of previous cases cited. Baldwin v. Porter, 12 Conn. 473; Clark v. Whitaker, 19 id. 330. Referring to the cases in New York denying the benefit of such mitigation to the wrong-doer when the sale is made upon process sued out by his agency or for his benefit, Waite, J., said: "We are unable to yield our assent to the correctness of that doctrine as applied to a case like the present, where there has been a legal appropriation of the property. Ward, the defendant, had a legal right to attach the goods in question; and as they were subsequently legally appropriated to the payment of the plaintiff's debt, he has in that way received the full value of his property. The defendants admit that they have committed a trespass in taking the goods; and that they are liable to pay the

plaintiff all the damage he has sustained thereby, and no more. These are for the original taking and detention until the second attachment. Beyond this they have done him no wrong. He has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by the payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes it would hardly be claimed that he could afterwards recover their value of the defendant. The same result ought to follow if he suffered them to be applied in due form of law to the payment of his debt." See Wehle v. Butler, 61 N. Y. 245, which was apparently a similar case, in which the New York doctrine was applied and mitigation denied. See Bates v. Courtwright, 36 Ill. 518; Wannamaker v. Bowes, 36 Md. 42; Squire v. Hollenbeck, 9 Pick. 551, 20 Am. Dec. 506.

The defendant in trespass for the wrongful levy of an attachment may show in mitigation that the property which he wrongfully took from the plaintiff has been applied for the benefit or advantage of the owner thereof, and it is immaterial that such defendant was not the plaintiff in the attachment suit. Grisham v. Bodman, 111 Ala. 194, 20 So. Rep.

could have the benefit of it.<sup>1</sup> But in New York, as the law is settled, to protect the wrong-doer or to entitle him to prove such sale and application of proceeds in mitigation the seizure must be at the instance of a third person and not at the instance of the wrong-doer or upon process in his favor.<sup>2</sup> Where the wrong-doer is not thus excluded by the policy of the law in reprobation of his tort from the benefit of such mitigation it is generally available to him.<sup>3</sup>

If animals are killed through negligence it is the duty of their owner, if their carcasses are of any appreciable value for any purpose, to use such measure of diligence, as is reasonable considering the circumstances, to realize for them all they are worth. If he fails to do so their net value must be estimated and deducted from the damages claimed.<sup>4</sup>

Where two ships were injured in a collision, the liability of one for the damage being admitted, and the injured ship was dry docked for repairs, and while in dock had her bottom cleaned and painted, and her bilge keels fitted, things the doing of which had been contemplated, but not decided upon, before the collision, and the doing of which in no way delayed or otherwise interfered with the making of the repairs, the wrong-doer was not entitled to a reduction of the dock charges because of these facts.<sup>5</sup> There is no principle of law which requires a person to contribute to an outlay merely because he had derived a material benefit from it.<sup>6</sup> Nor is one who has been injured in his right of property to receive less than compensation because he did not contemplate the full use of the property, as where water at a dam was appropriated.<sup>7</sup>

514, citing *Squire v. Hollenbeck*, 9 Pick. 551; *Perry v. Chandler*, 2 Cush. 237.

<sup>1</sup> *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511.

<sup>2</sup> *Id.*; *Otis v. Jones*, 31 Wend. 394; *Lyon v. Yates*, 52 Barb. 237; *Peak v. Lemon*, 1 Lans. 295; *Higgins v. Whitney*, 24 Wend. 379; *Sherry v. Schuyler*, 2 Hill, 204; *Wehle v. Butler*, 61 N. Y. 245.

<sup>3</sup> *Howard v. Cooper*, 45 N. H. 339; *Doolittle v. McCullough*, 7 Ohio St. 299; *Montgomery v. Wilson*, 48 Vt. 616.

<sup>4</sup> *Case v. St. Louis R. Co.*, 75 Mo. 668; *Dean v. Chicago & N. R. Co.*, 43 Wis. 305; *Georgia Pacific R. Co. v. Fullerton*, 79 Ala. 298; *Illinois Central R. Co. v. Finnegan*, 21 Ill. 646; *Roberts v. Richmond & D. R. Co.*, 88 N. C. 560; *Harrison v. Missouri Pacific R. Co.*, 88 Mo. 625.

<sup>5</sup> *The Acanthus*, 112 L. T. 153, [1902] Prob. 17.

<sup>6</sup> *Ruabon Steamship Co. v. London Assurance*, [1900] App. Cas. 6.

<sup>7</sup> *Green Bay, etc. Canal Co. v. Kaukauna Water Power Co.*, 112 Wis. 323, 87 N. W. Rep. 864; *Patterson v.*

§ 158. **No mitigation when benefit not derived from defendant.** Generally there can be no abatement of damages on the principle of partial compensation received for the injury where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*.<sup>1</sup> As where a man whose wife was killed remarries; the pecuniary value of the services rendered by the wife of the second marriage cannot avail the party who is responsible for the death of the first [243] wife.<sup>2</sup> A man who was working for a salary was injured by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation;<sup>3</sup> nor does the gratuitous care and nursing of an injured plaintiff relieve the party who caused the injury from liability for their worth.<sup>4</sup> Nor will proof of money paid to the injured party by an insurer or other third person by reason of the loss or injury be admissible to reduce damages in favor of the party by whose fault such injury was done.<sup>5</sup> The payment of such moneys not

Mississippi Boom Co., 98 U. S. 403; *Jegon v. Vivian*, L. R. 6 Ch. App. 742.

<sup>1</sup> In an action against a railroad company and the construction company which built its road to recover for damage to adjacent property by excavations in the streets, it was competent to prove that the damage had been repaired by the city soon after it was done. *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254, 9 So. Rep. 202.

<sup>2</sup> *Davis v. Guarniere*, 45 Ohio St. 470, 4 Am. St. 548, 15 N. E. Rep. 350.

<sup>3</sup> *Ohio, etc. R. Co. v. Dickerson*, 59 Ind. 317. But see ch. 36.

<sup>4</sup> *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. Rep. 874. In some jurisdictions neither of the two preceding rules is recognized. See ch. 36.

<sup>5</sup> *Cunningham v. Evansville, etc. R. Co.*, 102 Ind. 478, 1 N. E. Rep. 800, 52 Am. Rep. 633; *Hammond v. Schiff*,

100 N. C. 161, 6 S. E. Rep. 753; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Pittsburg, etc. R. Co. v. Thompson*, 56 Ill. 138; *Texas & P. R. Co. v. Levi*, 59 Tex. 674; *Hayward v. Cain*, 105 Mass. 213; *Clark v. Wilson*, 103 id. 219, 4 Am. Rep. 532; *Propellor Monticello v. Mollison*, 17 How. 152; *The Yeager*, 20 Fed. Rep. 653; *Owens v. Baltimore & O. R. Co.*, 35 id. 715; *Weber v. Morris, etc. R. Co.*, 36 N. J. L. 213; *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574; *Briggs v. New York, etc. R. Co.*, 72 N. Y. 26; *Perrott v. Shearer*, 17 Mich. 48; *Yates v. Whyte*, 4 Bing. N. C. 272; *Kingsbury v. Westfall*, 61 N. Y. 356; *Althorf v. Wolfe*, 22 N. Y. 355; *Port Glasgow & New-ark Sailcloth Co. v. Caledonia R. Co.*, 19 Rettie. 608; *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. Rep. 396, 52 Am. St. 465; *Allen v. Barrett*, 100 Iowa, 16, 69 N. W. Rep. 272; *Mathews v. St. Louis, etc. R.*



being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing and take all the benefit of a policy of insurance without paying the premium.<sup>1</sup> The same principle has been applied to life insurance in recent cases.<sup>2</sup> In the English case cited in the note the writer of the opinion of the house of lords said that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss by the death of her husband, but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one-half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life effected by a man in the position of the deceased, whose earnings were \$75 a month, and who left no estate. "The pecuniary benefit

121 Mo. 298, 336, 24 S. W. Rep. 591, 25 L. R. A. 161, quoting the text; Rolfe v. Boston & M. R. Co., 69 N. H. 476, 45 Atl. Rep. 251; Lake Erie & W. R. Co. v. Falk, 62 Ohio St. 297, 56 N. E. Rep. 1020; Lindsay v. Bridgewater Gas Co., 3 Pa. Dist. Rep. 716, citing the text; Anderson v. Miller, 96 Tenn. 35; 33 S. W. Rep. 615, 54 Am. St. 812, 31 L. R. A. 604; Brown v. McRae, 17 Ont. 712; Chicago, etc. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 11 Sup. Ct. Rep. 490.

<sup>1</sup> Mayne on Dam. (6th ed.), p. 115; Dillon v. Hunt, 105 Mo. 154, 163, 24 Am. St. 374, 16 S. W. Rep. 516, quot-

ing the whole paragraph of the text as it stood in the first edition.

<sup>2</sup> Coulter v. Pine Township, 164 Pa. 543, 30 Atl. Rep. 490; Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 308; Althorf v. Wolfe, 22 N. Y. 355; Terry v. Jewett, 17 Hun. 395; Sherlock v. Alling, 44 Ind. 184; Western & A. R. Co. v. Meigs, 74 Ga. 557; Grand Trunk R. v. Beckett, 16 Can. Sup. Ct. 713, 13 Ont. App. 174; Grand Trunk R. Co. v. Jennings, 13 App. Cas. (1888), 800; Clune v. Ristine, 94 Fed. Rep. 745, 36 C. C. A. 450, citing the text. See § 1265.

which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. In such a case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that, Lord Campbell<sup>1</sup> suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy." On the same principle it would be no defense in an action by an annuitant or any other creditor that the value of the annuity had been recovered against the plaintiff's attorney in an action for negligence in its negotiation, or that the sheriff had been forced to pay the debt in an action for an escape.<sup>2</sup> And where a number of plaintiffs sued for damages resulting from delaying their ship it was no ground for reducing the amount that some of these plaintiffs had been benefited by getting an increase of passengers in another ship; the result would have been the same if there had been only one plaintiff who owned both ships.<sup>3</sup> So general benefits resulting to the plaintiff from the erection and proximity to his property of the defendant's mill are no ground for a reduction of the damages the plaintiff suffers by the overflowing of his land from the defendant's [244] dam.<sup>4</sup> And in an action by the master for seduction of his servant evidence that the defendant offered to marry the girl is not admissible in mitigation.<sup>5</sup> In an action against one

<sup>1</sup> In *Hicks v. Newport, etc. R. Co.*, 4 B. & S. 403, n.

For a consideration of the authority of this case see *Harding v. Townshend*, 43 Vt. 536, 541, 5 Am. Rep. 308. A contrary conclusion has been arrived at under a statute similar to that under which the English case was ruled. *Althorp v. Wolfe*, 22 N. Y. 355.

<sup>2</sup> *Mayne on Dam.* (6th ed.), p. 115; *Hunter v. King*, 4 B. & Ald. 209.

<sup>3</sup> *Mayne on Dam.* (6th ed.), p. 115; *Jebsen v. East & W. India Dock Co.*, L. R. 10 C. P. 300.

<sup>4</sup> See *Francis v. Schoelkopf*, 53 N. Y. 152; *Marcy v. Fries*, 18 Kan. 353.

<sup>5</sup> *Ingersoll v. Jones*, 5 Barb. 661; *First Nat. Bank v. Rush*, 29 C. C. A. 333, 85 Fed. Rep. 539, citing the text. See *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100.

of several co-trespassers evidence of payments by any one of them, though not received in full satisfaction, is admissible; they are payments made on account of the injury by those primarily liable; full satisfaction from either would discharge all and partial compensation should have this effect *pro tanto*.<sup>1</sup> An offer by a wrong-doer to purchase property which has been injured at a price put upon it by a third person cannot be proven.<sup>2</sup> In a suit to recover for the breach of a contract to furnish employment the defendant may show that wages have been obtained from other parties.<sup>3</sup>

§ 159. Fuller proof of the *res gestæ* in trespass, negligence, etc. Mitigation of damages frequently results from fuller proof of the *res gestæ*, or the disclosure of some peculiar or exceptional feature pertaining to the particular case, making it apparent that the plaintiff's injury is less than it would otherwise appear to be, or that the defendant is less culpable. A defendant in mitigation of damages for assault and battery may rely on the *res gestæ* although if pleaded it would amount to a justification and require a special plea.<sup>4</sup> In an action for breach of a marriage promise it may be shown that the defendant's family disapproved of the match on the ground that this would diminish the happiness of the union,<sup>5</sup> and that the defendant was afflicted with an incurable disease at the time of the breach;<sup>6</sup> but the jury cannot consider in mitigation the possible consequences of marrying the defendant arising from a want of that love and affection which a husband should have for his wife.<sup>7</sup>

In trespass, under a plea of not guilty, the defendant has been permitted to show title in himself to confine the plaintiff's recovery to the quantity of his interest,<sup>8</sup> and in an action to recover for damages done by cattle it may be shown that the animals got upon the plaintiff's land by reason of the defect-

<sup>1</sup> Chamberlin v. Murphy, 41 Vt. 110.

<sup>2</sup> Mayor v. Harris, 75 Ga. 761.

<sup>3</sup> Owen v. Union Match Co., 48 Mich. 348, 12 N. W. Rep. 175.

<sup>4</sup> Byers v. Horner, 47 Md. 23; Russell v. Barrow, 7 Port. 106. But see Watson v. Christie, 2 Bos. & P. 224.

<sup>5</sup> Irving v. Greenwood, 1 C. & P. 350.

<sup>6</sup> Sprague v. Craig, 51 Ill. 586.

<sup>7</sup> Piper v. Kingsbury, 48 Vt. 480.

<sup>8</sup> Ballard v. Leavell, 5 Call, 531.

In trespass for killing a dog evidence of his bad habits, other than such as are pleaded in justification, may be proven in mitigation. Reynolds v. Phillips, 13 Ill. App. 557; Dunlap v. Snyder, 17 Barb. 561.

iveness of his fence.<sup>1</sup> An officer against whom an action is brought for entering the plaintiff's house and assaulting him may show in mitigation, but not to prove the entry lawful, that he entered for the purpose of making, and did in fact make, service under an attachment, although the attachment [245] was unlawful by reason of the writ not having been returned into court.<sup>2</sup> Where, in consequence of the defendant's embankment, the flood waters of a river were pent up and flowed over the plaintiff's land, and it appeared that had the embankment not been constructed the waters would have flowed a different way but would have reached his land and done damage to a lesser extent, the measure of damages was the difference between the two amounts;<sup>3</sup> and in an action for a nuisance in erecting mills and maintaining a steam-engine and furnaces in the vicinity of the plaintiff's dwelling the defendant was entitled to show the general character of the neighborhood, the various kinds of business carried on there, and the class of tenants by whom the dwelling-houses were in general occupied, and also the probable disadvantage and loss to the plaintiff from an inability to rent his houses, if, in consequence of the destruction or removal of the defendant's mills, there were no longer workmen to whom they could be leased.<sup>4</sup> The concurrence of other causes with the defendant's acts in creating a nuisance may also be shown in mitigation.<sup>5</sup>

On an assessment of damages after a default in an action for negligence, the defendant for mitigation and to reduce them to a nominal sum may show that there was no negligence; for this purpose it is immaterial whether the charge is of injury to person or property or that the damages are entire and indivisible.<sup>6</sup> A total or partial want or failure of consideration, on the same principle, may be shown in an action upon contract,<sup>7</sup> or any defense arising out of the plaintiff's cause of action itself, as where the action is for the price of labor or of a

<sup>1</sup> *Young v. Hoover*, 4 Cranch C. C. 187.

<sup>2</sup> *Paine v. Farr*, 118 Mass. 74.

<sup>3</sup> *Workman v. Great Northern R. Co.*, 32 L. J. (Q. B.) 279.

<sup>4</sup> *Call v. Allen*, 1 Allen, 137. See *Francis v. Schoellkopf*, 53 N. Y. 152.

<sup>5</sup> *Sherman v. Fall River Iron Works*, 5 Allen, 213.

<sup>6</sup> *Batchelder v. Bartholomew*, 44 Conn. 494.

<sup>7</sup> *Darnell v. Williams*, 2 Stark. 166; *Simpson v. Clarke*, 2 Cr., M. & R. 342.

commodity and defects are proved.<sup>1</sup> And in many English cases this defense is recognized where, according to the general course of American decisions, the broader defense of recoupment would be allowed.<sup>2</sup>

§ 160. **Official neglect.** In actions for neglect of duty or misconduct of ministerial officers affecting parties entitled to call on them for service, or for whom such officers are required by law to perform duties, as well as in like actions by employers against agents and attorneys, the general rule is that the injured party is entitled to compensation commensurate with his actual loss.<sup>3</sup> Where such neglect or misconduct results in a failure to collect a debt or impairs an existing security, and the *prima facie* loss is the amount of the debt, ordinarily any evidence is properly defensive or receivable in mitigation which negatives that loss either wholly or in part.<sup>4</sup> A sheriff in an action for escape or any neglect in respect to an execution may show that the execution debtor was wholly or partially insolvent, that if due diligence had been used the whole judgment or some part would have remained unsatisfied.<sup>5</sup>

<sup>1</sup> Crookshank v. Mallory, 2 Greene, 257; Basten v. Butter, 7 East, 479; Farnsworth v. Garrard, 1 Camp. 38; Denew v. Daverell, 3 Camp. 451; Baillie v. Kell, 4 Bing. N. C. 638; Cutler v. Close, 5 C. & P. 337; Sinclair v. Bowles, 9 B. & C. 92; Thornton v. Place, 1 M. & Rob. 218; Kelly v. Bradford, 33 Vt. 35; McKinney v. Springer, 3 Ind. 59; Allen v. McKibbin, 5 Mich. 449; Wood v. Schettler, 23 Wis. 501.

<sup>2</sup> Street v. Blay, 2 B. & Ad. 456; Parson v. Sexton, 4 C. B. 899; Poulton v. Lattimore, 9 B. & C. 259; Mondel v. Steel, 8 M. & W. 858; Dawson v. Collis, 10 C. B. 533.

<sup>3</sup> Amy v. Supervisors, 11 Wall. 136; Swan v. Bridgeport, 70 Conn. 143, 30 Atl. Rep. 110; Harris v. Murfree, 54 Ala. 161; Mechem on Public Officers, § 766.

<sup>4</sup> Van Wart v. Woolley, 3 B. & C. 439; Allen v. Snydam, 20 Wend. 321,

32 Am. Dec. 555; Russell v. Turner, 7 Johns. 189, 5 Am. Dec. 254; Russell v. Palmer, 2 Wils. 325; Stowe v. Bank of Cape Fear, 3 Dev. 408; Swan v. Bridgeport, *supra*; Townsend v. Libbey, 70 Me. 162; Wilson v. Strobach, 59 Ala. 488; Mechem on Public Officers, § 766. In § 759 of Mechem it is said that if the escape is voluntary the officer is liable for the whole amount of the debt whether the debtor be solvent or insolvent (State v. Hamilton, 33 Ind. 502), while if the escape is the result of negligence, though the whole judgment is *prima facie* the measure of the damages, the officer may show in mitigation that the debtor had no property with which he could have paid or secured the debt in whole or in part. State v. Mullen, 50 Ind. 598.

<sup>5</sup> Kellogg v. Manro, 9 Johns. 300; Patterson v. Westervelt, 17 Wend. 543; Hootman v. Shriner, 15 Ohio

There is an apparent exception to the general proposition that the party injured shall only recover his actual loss in the case of ministerial officers through whose diligent action the party interested must realize a debt or come into possession of a right. Where a sheriff suffers an escape on final process or fails to collect and return an execution, or to perform a peremptory duty to levy a tax or the like, the fact that the debt is still safe and collectible by a repetition of the resort to the [247] defendant officially is no defense;<sup>1</sup> otherwise, as Watson, J., said:<sup>2</sup> "If the officer is sued for a neglect of duty he can say the defendant had no property out of which he could collect the money, and that, it is conceded, is a good defense; or he can say he has property out of which you can still collect it, and therefore nothing but nominal damages can be recovered. The second execution issued upon the same judgment would admit of the same defense, and so on as often as they might be issued, provided the judgment debtor did not in the meantime get rid of his property."<sup>3</sup> In an action against a supervisor of a town who was required by law to assess the damages which had been allowed the plaintiff for property taken for public use, and who had omitted to do so, the supervisor was personally liable for the whole amount which the plaintiff had been unable to obtain by reason of the refusal to perform his duty.<sup>4</sup> "It cannot be assumed that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not to be thus put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must

St. 43; Ledyard v. Jones, 7 N. Y. 550; Brooks v. Hoyt, 6 Pick. 468; Shackford v. Goodwin, 13 Mass. 187; Lush v. Falls, 63 N. C. 188; West v. Rice, 9 Met. 564; State v. Baden, 11 Md. 317; State v. Mullen, 50 Ind. 598; Coe v. Peacock, 14 Ohio St. 187; Cooper v. Wolf, 15 id. 523; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Dunphy v. Whipple, 25 Mich. 10.

<sup>1</sup> Ledyard v. Jones, 7 N. Y. 550; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Kel-

logg v. Manro, 9 Johns. 300; Arden v. Goodacre, 11 C. B. 371; Moore v. Moore, 25 Beav. 8; Hemming v. Hale, 7 C. B. (N. S.) 487; Macrae v. Clarke, L. R. 1 C. P. 403; Goodrich v. Starr, 18 Vt. 227; State v. Hamilton, 33 Ind. 502; Hodson v. Wilkins, 7 Me. 113, 20 Am. Dec. 347; Weld v. Bartlett, 10 Mass. 470.

<sup>2</sup> Ledyard v. Jones, 7 N. Y. 550.

<sup>3</sup> But see Tempest v. Linley, Clayton, 34; Norris' Peake, 608; Stevens v. Rowe, 3 Denio, 327.

<sup>4</sup> Clark v. Miller, 54 N. Y. 528.

answer to the whole injury which he has occasioned.”<sup>1</sup> This rigorous severity is exceptional and based on considerations of policy to insure the active diligence of such officers; it is in fact punitive in its nature and object. In the case next

<sup>1</sup> In the overruled case of *Stevens v. Rowe*, 3 Denio, 327, which was an action against a sheriff for neglecting to return an execution, Beardsley, J., said: “At common law no action lay for such violation of duty, although the sheriff might be attached and punished for it. I admit, however, that under the statute an action may be maintained for such misconduct, and in which the party aggrieved is entitled to recover ‘for the damages sustained by him’ (2 R. S. 440, § 77; *Pardee v. Robertson*, 6 Hill, 550). The amount to be recovered is thus prescribed by the statute, which is ‘the damage sustained’ by such violation of duty, whatever the amount may be. The full amount to be levied and made on the execution is not necessarily recoverable, although *prima facie* that may be the just measure of reparation where nothing is shown to induce a belief that the real loss of the aggrieved party is less than that amount.” After referring to the point decided in *Pardee v. Robertson*, *supra*, and in *Bank of Rome v. Curtiss*, 1 Hill, 275, he continued: “I must say that I should find great difficulty in following either of these cases as authority, even where the facts and circumstances were identically the same; and I am by no means disposed to extend them as authority to cases which admit of a plain distinction in matter of fact. The decision in *The Bank of Rome v. Curtiss* was said to be in accordance with the rule laid down in two cases adjudged in Massachusetts; but as I read those cases they have no application to such a state of facts as was shown to exist in *The Bank of Rome*

*v. Curtiss*. In that case it appeared that the debt had not been lost, although its collection had been delayed by the neglect of the sheriff; for the proof shows that the debt was still safe and collectible. Yet the court held that the sheriff was liable for the full amount of the execution in his hands. I am unable to see any such rule laid down in either of the Massachusetts cases. In the first of these cases in order of time (*Weld v. Bartlett*, 10 Mass. 474), Parker, J., said that where an officer had neglected to do his duty, *so that the effect of the judgment appears to be lost*, the judgment in the suit so rendered ineffectual is *prima facie* evidence of the measure of injury which the plaintiff has sustained; but it may be met by evidence of the inability of the debtor to pay.’ The other case (*Young v. Hosmer*, 11 Mass. 89) is equally explicit, and makes the sheriff liable for the entire debt; because ‘the benefit of the judgment to the whole amount of it is to be presumed lost by the negligence of the officer.’ This principle can surely have no bearing on a case in which it appears that the judgment had not been lost, but was still safe and collectible. In *Kellogg v. Manro*, 9 Johns. 300, which was also cited as sustaining *The Bank of Rome v. Curtiss*, the rule is stated as in the Massachusetts cases. It was said to be too plain for discussion that the plaintiff might recover beyond nominal damages. ‘He is entitled,’ say the court, ‘*prima facie*, to recover his whole debt, which is presumed to be lost by the escape.’ I make no objection to this rule in any action brought against an officer for

referred to, however, the rule was applied to an officer who, by an error of judgment, omitted to assess a tax for a sum due. He omitted to do it because he believed the law requiring it was unconstitutional. The court say honest ignorance does [249] not excuse a public officer for disobeying the law.<sup>1</sup> It will exempt him from punitive damages. In a case for escape Jarvis, C. J., said: "The rule might be supposed to operate unjustly towards the sheriff where the execution debtor has the means of paying the debt at the moment of the escape and still continues notoriously in solvent circumstances. In this case the value of the custody was the amount of the debt, and the plaintiff will be entitled to recover substantial dam-

the violation of such a duty. *Prima facie* it may well be taken that the whole debt has been lost by the negligence of the officer; and if such be the fact, it is most just that he should pay the full amount. But when the proof shows that the debt has not been lost, although the collection has been delayed, and that it is still safe and collectible, it seems to me entirely clear that the rule laid down in the Massachusetts cases and in *Kellogg v. Manro* is wholly inapplicable. . . . In *Pardee v. Robertson* it was proved that the sheriff had actually collected the full amount of the execution; the money still remaining in his hands. But in the case now to be decided the fact was otherwise. The proof showed that the money had not been collected; although, if the judgment was a lien on real estate in the county of Oswego, as the plaintiff offered to show, the sheriff might have made the amount as required by the execution. . . . If the sheriff should be compelled to pay the full amount of the execution, for the reason that the judgment was a lien on real estate out of which the money might have been collected, as was offered to be proved on the part of the plaintiffs, he would be entirely remediless.

He could not enforce the judgment and execution for his own indemnity, but must stand the entire loss. This would be too severe where the debt is still safe and the only injury sustained has resulted from mere delay. It is just that the sheriff should make the party good by paying all the damages sustained by him; and so is the statute on which the action is founded; but to go beyond this seems to me quite too rigorous. *Prima facie* the sheriff is liable for the full amount of the execution debt, as it is presumed to have been lost by his neglect. This, in my estimation, is not a very violent presumption, but still may be just in regard to the officer who is in default. But when it is shown that the debt has not been lost, there is no room for presumption, and the *prima facie* case no longer exists. By the statute the measure of recovery is the 'damages sustained,' which, presumptively, I admit is the full amount of the execution. But the sheriff may mitigate the amount not simply by showing his inability to collect the money, but by proof that the debt is still safe and collectible."

<sup>1</sup> *Clark v. Miller*, 54 N. Y. 528. See *Dow v. Humbert*, stated in the text of § 161.



ages. It is true that the recovery of such damages will not satisfy the execution, and the debtor may be retaken by the plaintiff; for the debtor cannot take advantage of his own wrong and avail himself of the recovery against the sheriff. On the other hand, the sheriff is not damnified, for he may retake the debtor or recover against him by action the amount he has been compelled to pay."<sup>1</sup> Where the officer fails to collect an execution from a debtor who is "notoriously in solvent circumstances," and continues so, there is no wrong done the execution debtor, as in an escape, to give the sheriff any action against him; nor do the authorities in this class of actions proceed on the theory that such a recovery against the sheriff transfers the judgment debt to him. Hence the recovery of the full amount of the judgment or other demand against an officer who has neglected to do some act which [250] would have enabled the party interested to realize at once, the debtor being still solvent, or the debt not being wholly lost by the default, is not a measure of damages which is strictly compensatory. To the extent of the actual value of the debt in respect to which the negligence occurred at the time of the recovery against the officer, the plaintiff is over-compensated when he has recovered from the officer the full amount. Exclusion of proof of that value in mitigation cannot rest on the argument that its reception and consideration would deprive the creditor of any compensation for actual loss.

§ 161. **Same subject; modification of the old rule.** The supreme court of the United States<sup>2</sup> has limited the application of this rigorous rule against officers. The action was for neglect of duty by the defendants as supervisors in refusing to place upon the tax list as required by a statute the amount of two judgments recovered by the plaintiff. The debtor being a township, it was presumed that its taxable property continued the same as when the levy should have been made. Miller, J., said: "The single question presented is whether these officers, by the mere failure to place on the tax list when it was their duty to do so, the judgment recovered by the plaintiff against the town, became thereby personally liable to

<sup>1</sup> Arden v. Goodacre, 11 C. B. 371.

<sup>2</sup> Dow v. Humbert, 91 U. S. 294.

the plaintiff for the whole amount of said judgment without producing any other evidence of loss or damage growing out of such failure. It is not easy to see upon what principle of justice the plaintiff can recover from the defendants more than he has been injured by their misconduct. If it were an action of *trespass* there is much authority for saying that the plaintiff would be limited to actual and compensatory damages unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that for a failure to perform an act of official duty, through mistake of what that duty is, that the plaintiff should be limited in his recovery to his actual loss, injury or damage. Indeed, where such is the almost universal rule for measuring damages before a jury [251] there must be some special reason for a departure from it. . . . The expense and cost of the vain effort to have the judgment placed on the tax list, the loss of the debt, if it had been lost, any impairment of the efficiency of the tax levy, if such there had been, in short, any conceivable actual damage,—the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that, and would accept no less.” The court reached the conclusion “that in the absence of any proof of actual damage . . . the defendants were liable to nominal damages and to costs, and no more.” In a later case, which was very aggravated, the defendants having refused to obey a *mandamus* to collect the amount of a judgment by adding it to the tax roll, the court allowed the plaintiff his counsel fees and costs.<sup>1</sup>

[252] § 162. **Plaintiff's consent.** The previous consent of the plaintiff to the act which he complains of, though not given in a form to bar him or support a plea of justification, may yet be proved in mitigation of damages. Thus in trespass for an alleged injury to the plaintiff's wall by inserting joists in it, evidence that the wall was so used by the defendant in the erection of an adjoining building under an express [253] parol agreement with the plaintiff is admissible under the

<sup>1</sup> Newark Savings Inst. v. Panhorst, 7 Biss. 99. See Branch v. Davis, 29 Fed. Rep. 888.

general issue in mitigation.<sup>1</sup> So it may be proved that the injury in question was inflicted in a fight by mutual consent.<sup>2</sup> In a suit by several heirs at law, who are cotenants, to recover for injury to their interests by cutting timber on the estate, the consent of one of them is a good defense; all suing in the same right, they must all be entitled to recover or none can.<sup>3</sup>

§ 163. **Injuries to character and feelings.** Any exceptional conduct or character of the plaintiff which impairs his title to compensation or diminishes the injury in question is provable in mitigation. In those actions where the wrong complained of involves injury to character the defendant may show, in order to reduce damages, the general bad character of the plaintiff.<sup>4</sup> The weight of New York authority favors the proposition that in an action by a female for an indecent assault, the injury to her feelings being an element of damages, specific acts of lewdness with others than the defendant may be shown in mitigation without being specially pleaded.<sup>5</sup> Evidence that the plaintiff's marriage with his reputed [254] wife was void is admissible in an action for seduction of his reputed daughter to rebut the presumption of actual service by showing that the plaintiff was not legally entitled thereto and in mitigation of damages.<sup>6</sup> In an action for criminal conversation it may be shown that the plaintiff was wanting in affection for his wife to support the inference that his loss was trifling,<sup>7</sup> or that there was but slight intercourse between them;<sup>8</sup> and in an action for breach of promise of marriage that the plaintiff was utterly unfit to appreciate the person to

<sup>1</sup> Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491.

<sup>2</sup> Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; § 151; Cooley on Torts (2d ed.), pp. 187, 188. Compare Bishop on Non-Contract Law, § 196. For cases holding that consent bars an action for a tort, see Goldnamer v. O'Brien, 98 Ky. 569, 33 S. W. Rep. 831, 56 Am. St. 378, 36 L. R. A. 715; Courtney v. Clinton, 18 Ind. App. 620, 48 N. E. Rep. 799. The only effect of consent is to confine the recovery to compensatory damages.

Evans v. Waite, 83 Wis. 286, 53 N. W. Rep. 445. See § 151.

<sup>3</sup> Lowery v. Rowland, 104 Ala. 420, 16 So. Rep. 88.

<sup>4</sup> Fitzgibbon v. Brown, 43 Me. 169. See § 152.

<sup>5</sup> Guilerette v. McKinley, 27 Hun, 320, reviewing the cases in New York; Young v. Johnson, 46 Hun, 164.

<sup>6</sup> Howland v. Howland, 114 Mass. 517, 19 Am. Rep. 381.

<sup>7</sup> Bromley v. Wallace, 4 Esp. 237.

<sup>8</sup> Calcraft v. Harbrough, 4 C. & P. 499.

whom he engaged himself.<sup>1</sup> Declarations by the plaintiff, pending the action, that she would not marry the defendant except for his money have been admitted.<sup>2</sup> The fact of a female plaintiff having had an illegitimate child, though known to the defendant at the time of the promise, may be proved,<sup>3</sup> and her intercourse with another man before and after the promise.<sup>4</sup> In actions for seduction proof of the plaintiff's careless indifference to the defendant's opportunities for criminal intercourse with her daughter may be shown in mitigation;<sup>5</sup> actual connivance by the plaintiff would be a bar.<sup>6</sup>

§ 164. **Reduction of loss or benefit.** Whatever diminishes the loss of the injured party, or where the recovery is influenced by the amount of benefit derived from the act complained of by the defendant, whatever decreases the value of that benefit may be proved in mitigation, where the matter diminishing the loss in the former case, or impairing the benefit in the other, is part of the transaction. Thus in an action against a contractor for failing to fulfill his contract he may show that the agreed price has not been paid.<sup>7</sup> And where A. took wrongful possession of premises on the 2d of June, and [255] a sum of money became due for ground rent on the 24th for the month ending on that day, which A. paid, it was held in an action for *mesne* profits that he was entitled to deduct the money so paid from the damages. In that case the payment of the ground rent diminished the value of the occupation to the defendant, and having paid what the plaintiff must otherwise have paid, his injury, for which *mesne* profits were compensation, was, to the amount paid, mitigated.<sup>8</sup> So a tenant has a right to deduct from rent all expenses or taxes which he has been compelled to pay for the lessor.<sup>9</sup> If a mortgagee who has brought an action for damage done to the

<sup>1</sup> Leeds v. Cook, 4 Esp. 256.

<sup>2</sup> Miller v. Rosier, 31 Mich. 475.  
*Contra*, Miller v. Hayes, 34 Iowa, 496, 11 Am. Rep. 154.

<sup>3</sup> Denslow v. Van Horn, 16 Iowa, 476.

<sup>4</sup> Burnett v. Simpkins, 24 Ill. 264.

<sup>5</sup> Zerfing v. Mourer, 2 Greene, 520;  
Parker v. Elliott, 6 Munf. 587.

<sup>6</sup> Bunnell v. Greathead, 49 Barb.

106; Smith v. Masten, 15 Wend. 270;  
Sherwood v. Titman, 55 Pa. 77.

<sup>7</sup> Reedy v. Tuskaloosa, 6 Ala. 327;  
Gabay v. Doane, 77 App. Div. 413,  
79 N. Y. Supp. 312.

<sup>8</sup> Doe v. Hare, 2 Cr. & M. 145.

<sup>9</sup> Sapsford v. Fletcher, 4 T. R. 511;  
Taylor v. Zamira, 6 Taunt. 524; Car-  
ter v. Carter, 5 Bing. 406.

mortgaged premises by a removal of fixtures has sold the premises intermediate the injury and the action for more than enough to pay his debt and all prior incumbrances, this fact may be proven in mitigation of damages.<sup>1</sup>

The immediate landlord is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect to which the rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due.<sup>2</sup> Of this nature are not only payments of ground rent to the superior landlord, but interest due upon a mortgage prior to the lease,<sup>3</sup> an annuity charged upon the land,<sup>4</sup> and rates and taxes.<sup>5</sup> But where the payment of the ground rent or other like charge gives no right of action against the party suing for the rent, this right of deduction does not exist.<sup>6</sup>

**§ 165. Pleading in mitigation.** It has sometimes been held as a general rule that matters which would have gone in bar of the action cannot be given in evidence to reduce damages unless pleaded. Lord Abinger, C. B., said:<sup>7</sup> "It is a principle as old as my recollection of Westminster Hall that matter of justification cannot be given in evidence in an action in order to mitigate damages." The case was an action for wrongfully discharging the plaintiff from the defendant's service; the latter pleaded only payment of money into court. It was contended in his favor that he should be allowed to show in mitigation that the discharge was for misconduct, as under this issue there was merely an inquiry of damages; that the same evidence was admissible as [256] upon a writ of inquiry after a judgment by default. It was held properly rejected. Alderson B., said: "The question is whether it is competent to the defendant in mitigation of damages to give evidence to contradict a fact admitted on the record. If it were the grossest injustice might be done, because the other party does not, of course, come prepared to

<sup>1</sup> King v. Bangs, 120 Mass. 514.

<sup>2</sup> Graham v. Allsopp, 3 Ex. 186.

<sup>3</sup> Johnson v. Jones, 9 A. & E. 809.

<sup>4</sup> Taylor v. Zamira, 6 Taunt. 524.

<sup>5</sup> Baker v. Davis, 3 Camp. 474; Andrew v. Hancock, 1 B. & B. 37.

<sup>6</sup> Graham v. Allsopp, *supra*.

<sup>7</sup> Speck v. Phillips, 5 M. & W. 279.

prove the fact so admitted." And Maule, B., said: "No question was made that the plaintiff was wrongfully discharged; and I think it was not competent to the defendant to give evidence to negative that which is admitted by the plea. If it were, the consequence would follow that no defendant would ever plead specially; he would pay a shilling into court and set up as many defenses as he pleased, and succeeding in any one of them, would get a verdict and his costs. This would be setting aside not only the new rules, but all the old rules which required special pleadings in actions of this nature."<sup>1</sup>

In trespass against a constable for arresting the plaintiff and imprisoning him, the declaration stated it to have been without reasonable or probable cause; the court said a constable may justify an arrest for reasonable cause on suspicion alone; and in this respect he stands on more favorable ground than a private person, who must show, in addition to such cause, that a felony was actually committed; that the difficulty was to determine whether circumstances of suspicion which might have been pleaded in justification were competent to go to the jury under the general issue in mitigation. They say the objection rests on the rule which requires matter of justification

<sup>1</sup> In *Watson v. Christie*, 2 B. & P. 224, tried before Lord Eldon, C. J., the action was for assault and battery, and not guilty pleaded. It was offered to be shown that the beating was given by way of punishment for misbehavior on shipboard. The jury were directed that the only questions for their consideration were whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet such a defense could not be resorted to unless put upon the record in the shape of a special justification; that the defendant had not said on the record that this was discipline, or justified

it on any ground; that much evil, beyond the mere act had been actually suffered, which evil had been occasioned by a cause which the defendant admitted he could not justify; that in his lordship's judgment, therefore, the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil suffered without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond compensation for the injury actually sustained they would give too much; but if they gave less they would not give enough. See *Pujolas v. Holland*, 3 Irish C. L. 533; *Gelston v. Hoyt*, 13 Johns. 561.

to be pleaded specially. - At the first blush one would not perceive a reason to preclude a party who had waived the benefit of a full defense from showing the purity of his motives to shield him from exemplary damages; and there is in truth none except that the plaintiff is not apprised by the pleadings of the defendant's intention. Yet where the defendant is not at liberty to apprise him by pleading in justification the matter is for that very reason allowed to be given in evidence. But whatever inconsistency there may seem to be in point of principle the defendant when charged with making an arrest without probable cause may rebut the charge.<sup>1</sup>

§ 166. **Same subject.** In actions for slander this rule was adopted long ago and has since been generally adhered to for special reasons. These have more or less force in other actions where the matter sought to be proved in mitigation would be a serious surprise to the plaintiff if introduced at the trial without any notice in the pleadings. Under the common-law system matter of mitigation which could not be used in bar of the plaintiff's cause of action, nor of any severable part of it, was for that reason provable without being pleaded. But under this rule matter which could have been made available in bar by plea was not necessarily admissible in mitigation. The admission of such defense was not within the reason and necessity of that rule. Courts may therefore properly exercise a discretion to require notice of some sort as they do of defenses by way of recoupment. It is believed, however, not to be a general rule, at least in this country, except in actions for libel and slander, that matter which might be set up in bar and is not so pleaded cannot be proved in mitigation. The existence of such rule has been denied in New York.<sup>2</sup> Judge Selden said: "It was never any objection to evidence in mitigation that under a different state of the pleadings it [258] would amount to a full defense." And again: "It seems to have been supposed that there was some sound legal objection to admitting proof of facts under the general issue *in mitigation merely* which, if specially pleaded, would amount to a full defense. But there is not, and never was, any such objection."<sup>3</sup>

<sup>1</sup> Russell v. Shuster, 8 W. & S. 398.

<sup>3</sup> In McKyring v. Bull, 16 N. Y. 297,

<sup>2</sup> Bush v. Prosser, 11 N. Y. 347, 362, 365.      304, the same judge said: "As the code contains no express rule on the

In Vermont it has been held in trover, after a default, that matter which shows that the plaintiff had no right to recover, and which might have been given in evidence under the general issue, may avail in mitigation of damages.<sup>1</sup> In a case in Connecticut, in a hearing for the ascertainment of damages after a default in an action for negligence in setting a fire by which property of the plaintiff was injured to the amount of \$400, the defendants were allowed to introduce evidence, for the purpose of reducing the damages to a nominal sum, that they were guilty of no negligence whatever. The plaintiff objected to the reception of the evidence on the ground that the defendants by their neglect to traverse the declaration and by suffering a default conclusively admitted that they were guilty of negligence sufficient for the plaintiff to maintain his action, and that, in a case of damage to property incapable of division, the least sum the court could assess as damages, consistent with the declaration, was the actual damage done. The court said: "From a time early in the history of the jurisprudence of this state the law has been that where, in an action on the case for the recovery of unliquidated damages, the defendant [259] has suffered a default, that is, has omitted to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also that by his omission to deny them the defendant is held to have admitted the truth of all well-pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law imputes the admission to him; but it does it with this limitation upon its meaning and effect, it does it for this special purpose and

subject of mitigation, except in a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By those principles defendants in actions sounding in damages were permitted to give in evidence in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but in many cases facts showing that

the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation that if properly pleaded it would have constituted a complete defense." See *Smithies v. Harrison*, 1 *Ld. Raym.* 727; *Abbot v. Chapman*, 2 *Lev.* 81; *Nicholl v. Williams*, 2 *M. & W.* 758.

<sup>1</sup> *Collins v. Smith*, 16 *Vt.* 9.



no other; and our courts have repeatedly explained that the admission founded on a default is not an admission of which the writers upon the law of evidence treat. The silent defendant, having been subjected to a judgment for nominal damages from which no proof can relieve him, the default has practically exhausted its effect upon the case; for if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above and on the part of the defendant to keep them down to that immovable base of departure, the nominal point, precisely as if the general issue had been pleaded; and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that the law perceives that he has all that the truth entitles him to and therefore refuses to hear any objection from him. . . . The plaintiff argues that his case differs from . . . all others which have gone before it, in that his damages are entire and indivisible and arise from a single act of the defendants. But the destruction of a life would seem to be an entire and indivisible wrong<sup>1</sup> in as complete a sense as the destruction of the plaintiff's grass, fence and wood; a single blow killed the man, a single spark fired the grass. The rule cannot be at all affected by the question as to whether the injury is inflicted upon person or property. In either case, at the outset, the damages are uncertain; in both they are made certain by the same tribunal, governed by the same rules, informed by evidence of the same character, received in the same order. An injury to the person may be the breaking of a finger or the tearing of both arms from the body; an injury to prop- [260] erty may be the destruction of a tree or of a forest. It is of course a much more difficult and delicate task to reduce to the standard of coin the value of a leg or an arm than to determine the market price for a cord of wood, or for a standing tree of given dimensions; nevertheless, probably in every week, some one of the numerous courts of the country find for some plaintiff, presumably the money value of a lost limb. The

<sup>1</sup> Carey v. Day, 36 Conn. 152.

judicial system has but one balance; in this is weighed every loss, even that of life."<sup>1</sup>

In Maryland it has been held in trespass for an injury to the plaintiff's wall by inserting joists into it that evidence was admissible under the general issue of a previous license in mitigation, which would have been a bar if specially pleaded;<sup>2</sup> also, that a defendant in mitigation for assault and battery may rely on the *res gestæ*, although if pleaded it would amount to a justification and require a special plea.<sup>3</sup> In Virginia, in trespass for taking a slave from the plaintiff's close, on a plea of not guilty evidence was received in mitigation that the title to the slave was in the defendant.<sup>4</sup>

§ 167. **Payments.** Payments made either before or after suit brought may be proved in mitigation, but not in bar without plea nor under the general issue.<sup>5</sup> And the same rule is held in California under the code.<sup>6</sup> If full payment is made [261] after suit brought and is accepted for the debt and costs, the defendant will be entitled to a verdict.<sup>7</sup> It is necessary that the payment be made to cover the costs which have accrued,<sup>8</sup> and it should be pleaded to the further maintenance of the action.<sup>9</sup>

#### SECTION 4.

##### RECOUPMENT AND COUNTER-CLAIM.

§ 168. **Definition and history of recoupment.** The term *recoupment*, derived from the French word *recouper*, to cut again, signifies in the law a cutting off and keeping back a

<sup>1</sup> Batchelder v. Bartholomew, 44 Conn. 494; Saltus v. Kipp, 12 How. Pr. 342.

<sup>2</sup> Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491.

<sup>3</sup> Byers v. Horner, 47 Md. 23.

<sup>4</sup> Bullard v. Leavell, 5 Call, 531. See Moore v. McNairy, 1 Dev. 319.

<sup>5</sup> Dana v. Sessions, 46 N. H. 509; Shirley v. Jacobs, 2 Bing. N. C. 88; Lediard v. Boucher, 7 C. & P. 1; Britton v. Bishop, 11 Vt. 70; Bischof v. Lucas, 6 Ind. 26; Moore v. McNairy, 1 Dev. 319; Nicholl v. Williams, 2 M. & W. 758. See McKyring v. Bull, 16 N. Y. 297.

In Plevin v. Henshall, 10 Bing. 24,

after a verdict for the plaintiff in trover, the goods were seized in the hands of the defendant for rent which the plaintiff was liable to pay; the defendant having paid the rent, the court allowed him to deduct the amount from the verdict. But see Buell v. Flower, 39 Conn. 462, 12 Am. Rep. 414.

<sup>6</sup> Wetmore v. San Francisco, 44 Cal. 294, 300.

<sup>7</sup> Thame v. Boast, 12 Q. B. 808; Bendit v. Annesley, 27 How. Pr. 184.

<sup>8</sup> Belknap v. Godfrey, 22 Vt. 288.

<sup>9</sup> Thame v. Boast, *supra*; Dana v. Sessions, 46 N. H. 509; Bank v. Brackett, 4 id. 558.

part of the plaintiff's claim in satisfaction, by set-off, of cross-demands of the defendant growing out of the same contract or transaction on which the claim is founded. The same thing is meant by defalcation and discount. Literally understood, recoupment would include mere mitigation of damages, and the instances of this defense in the old books are mostly of that nature.<sup>1</sup> In the endeavor to reduce the controversy to a single point or issue very little scope was given by the early common law to defenses which rested on the principle of allowing cross-claims in favor of the defendant.

At one time it was doubted that in an action on a *quantum meruit* for services the defendant was entitled to reduce the damages by showing that the work had not been well done.<sup>2</sup> The allowance of such defenses was the result of a con- [262] sultation of the judges in England. In an action of that character Lord Ellenborough said: "This is an action founded on a claim for meritorious services. The plaintiff is to receive what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt on this point. Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind a cross-action for the negligence was necessary; but, that if the work be done the plaintiff must recover for it. I have since had a conference with the judges on the subject, and now I consider this as the correct rule: that if there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the extent of the plaintiff's demand, leaving the defendant to

<sup>1</sup> Dyer, 2; 8 Vin. Abr. 556-7; Croke's Eliz. 631; Taylor v. Beal, Croke's Eliz. 222; Shetelworth v. Neville, 1 T. R. 454.

The Illinois court must have had in mind the older meaning of the word when it said that "recoupment, in its strict common-law sense, is a mere reduction of the damages claimed by the plaintiff by

proof under the general issue of mitigating circumstances connected with or growing out of the transaction upon which the plaintiff's claim is based, showing that it would be contrary to equity and good conscience to suffer the plaintiff to recover the full amount of his claim." Wadhams v. Swan, 109 Ill. 46, 62.

<sup>2</sup> Farnsworth v. Garrard, 1 Camp. 38.

his action for the negligence.”<sup>1</sup> He also remarked that where a specific sum has been agreed to be paid by the defendant “the plaintiff may have some ground to complain of surprise if evidence be admitted to show that the work and materials provided were not worth so much as was contracted to be paid because he may only come prepared to prove the agreement for the specified sum and the work done, unless notice be given to him that the payment be disputed on the ground of the inadequacy of the work done. But where the plaintiff comes into court upon a *quantum meruit* he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice.”<sup>2</sup> The right to make such defenses is no longer in question; the plaintiff must show his performance of a condition precedent as a basis of the recovery either of an agreed sum or on a *quantum meruit*, and there is included in the mere right to make a defense the right to rebut the evidence of performance, and where the value is not fixed by agreement the amount reasonably due for such performance. In such cases, to the extent that the plaintiff’s [263] recovery proceeds on proof of performance or its reasonable value, the defendant, if he dispute either as shown by the plaintiff, must defend, or lose all right to contest the conclusions so arrived at or to redress for the deficiencies of the performance.<sup>3</sup> The direct defense by negating the facts which the plaintiff assumes to prove to measure his compensation, or those which, on the theory of his action, enter into the price and fix the amount of damages, is not recoupment,<sup>4</sup> nor is a defense which consists of a denial of facts which the plaintiff must prove to maintain his action, as the performance of a condition precedent.<sup>5</sup> The defense which is al-

<sup>1</sup> *Basten v. Butter*, 7 East, 479.

“The doctrine of recoupment is in general applicable whenever in the trial of the plaintiff’s action an investigation of the facts on which the claim of the defendant depends is necessary. The law does not compel parties to bring two actions when, with equal convenience, their rights can be settled in one.” *Johnson v. White Mountain Creamery*

*Ass’n*, 68 N. H. 437, 36 Atl. Rep. 13, 73 Am. St. 610.

<sup>2</sup> *Basten v. Butter*, *supra*.

<sup>3</sup> *Kellogg v. Denslow*, 14 Conn. 411; *Davis v. Tallcot*, 12 N. Y. 184.

<sup>4</sup> *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333.

<sup>5</sup> *Thompson v. Richards*, 14 Mich. 172; *Stoddard v. Treadwell*, 26 Cal. 294.

lowed under the name of recoupment is not a keeping back a part of the plaintiff's *prima facie* damage on the case he seeks to establish by evidence of the character explained under the title "mitigation of damages," but a reduction of the plaintiff's recovery by the allowance against him in his action of damages due the defendant on a substantive cause of action in his favor, growing out of the same transaction on which the plaintiff's claim or demand arises.

§ 169. **Same subject.** Until near the close of the eighteenth century the strict rules of the common law as to the independency of covenants and the entirety of conditions were rigidly enforced. A defendant sustaining damages from the breach of any counter or reciprocal obligation in the contract sued upon was put to his cross-action, unless he had made the performance of such obligation strictly a condition precedent to his undertaking to the plaintiff.<sup>1</sup> These rules were often attended with hardship, as where the plaintiff was insolvent and unable to respond afterwards or in a separate action. Thus, in an action for breach of a covenant to recover unliquidated damages the defendant pleaded set-off of like damages for the plaintiff's breach of his covenants in the same instrument. This defense was urged on grounds which now support recoupment. It, however, was rejected without any allusion to the right of recoupment because the statute of set-offs only applied to mutual debts, which did not include demands for un- [264] liquidated damages.<sup>2</sup> Until this species of defense had become firmly established the severe adherence to the old practice was in no cases more marked than in actions between landlord and tenant;— the former was allowed to collect his rent, notwithstanding his covenant to repair remained unperformed, even if he was himself insolvent.<sup>3</sup> The doctrine of recoupment has attained its growth since the revolution; but the courts of this country and of England have not given it the same expansion; nor has it made the same progress in all the states of the Union.<sup>4</sup>

In New York the defense was at first admitted in mitiga-

<sup>1</sup> 17 Am. L. Review, 392.

<sup>4</sup> See *Johnson v. White Mountain*

<sup>2</sup> *Howlet v. Strickland*, 1 Cowp. 56. *Creamery Ass'n*, 68 N. H. 427, 36 Atl.

<sup>3</sup> *Taylor's Landlord & T.*, § 373; 7 Rep. 13, 73 Am. st. 610.

Am. L. Review, 392.

tion of damages where there was fraud in respect to the consideration;<sup>1</sup> next where there was breach of warranty without fraud.<sup>2</sup> At this time it elicited increased discussion and received more emphatic judicial recognition. Marcy, J., said: "From an examination of the cases I am satisfied that in those where the damages arising from a breach of warranty in the sale of chattels have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded upon the ground that the express contracts were void by reason of fraud, and a recovery had upon a *quantum meruit* or *quantum valebat* upon implied contract; but upon a principle somewhat different from those adverted to in this case in the court below; upon a principle which has of late years been gaining favor with courts and extending the range of its operations. Such a defense is admitted to avoid circuitry of action." Hence he insisted, and the court decided, that damages arising from breach of warranty should be allowed to reduce the recovery as well where there was no fraud as where there was. So true was it that this new principle of avoiding circuitry of action "was *gaining* favor with the courts and *extending* the range of its operations," that the discrepancies at any given time to be noticed between the decisions of courts [265] of different states have indicated a relative progress rather than a permanent disagreement.<sup>3</sup>

§ 170. **Nature of defense.** This defense is founded on the natural equity that mutual demands growing out of the same transaction should compensate each other by deducting the less from the greater and treating the difference as the sum justly due.<sup>4</sup> It is also founded on the policy and convenience of settling an entire controversy in one action where it can be justly done, thus saving needless delay and litigation. By proper pleading, in the application of the doctrine of recoup-

<sup>1</sup> Becker v. Vrooman, 13 Johns. 302.

<sup>2</sup> Spalding v. Vandercook, 2 Wend. 431; McAllister v. Reab, 4 Wend. 483.

<sup>3</sup> The principle of recoupment, under various names, has been adopted in the general jurisprudence of this country. And it is believed that it

is now universally in force either by statute or otherwise; though in some states, in controversies at law where title to real estate is involved, the doctrine is not applied.

<sup>4</sup> Green v. Farmer, 4 Burr. 2214, 2220; Reab v. McAlister, 8 Wend. 109, 115; Myers v. Estell, 47 Miss. 4, 17-21.

ment, the court may look through the whole contract, treating it as an entirety, and the things done and stipulated to be done on each side as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor the grievances on each side are summed up, instead of those only on the plaintiff's side; a balance is struck, and the plaintiff can recover only when that balance is in his favor.<sup>1</sup> Some confusion has arisen from treating this defense as one of failure of consideration.<sup>2</sup> In an Alabama case<sup>3</sup> the plaintiff sued on a note which had been given for a clock sold by him to the defendant with warranty that it would keep good time. The clock was shown to be worthless as a time-piece; but the case alone was worth more than a nominal sum, and it was held that the plaintiff might claim an abatement on the note to the amount of damage that he had sustained. Having kept the clock, however, judgment must go against him for what it was actually worth. [266] By this decision the breach of warranty avoided the special contract and recovery proceeded on a *quantum meruit*.<sup>4</sup> This

<sup>1</sup> Luffburrow v. Henderson, 30 Ga. 482; Myers v. Estell, 47 Miss. 4.

<sup>2</sup> The courts of Illinois indorse the view of Mr. Freeman as expressed in his note to Van Epps v. Harrison, 40 Am. Dec. 323: "In its modern application the foundation of recoupment is failure of consideration. The defendant in effect admits his failure to perform the contract upon which he issued, and seeks to extenuate his default by showing that the plaintiff has failed in some particular to do that which was the consideration of the defendant's promise, and to that extent, therefore, the plaintiff has no right to hold the defendant liable; hence it is essential that the wrong of which the defendant complains should in some way impair the consideration of his contract—in other words, it must appear that the express or implied promise broken by the plaintiff was

the consideration for the defendant's promise." Keegan v. Kinnare, 123 Ill. 280, 14 N. E. Rep. 14; Lyon v. Bryant, 54 Ill. App. 331. See Watkins v. Hopkins, 13 Gratt. 743. Compare Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Comparet v. Johnson, 6 Blackf. 59; Herbert v. Ford, 29 Me. 546; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Wheat v. Dotson, 12 Ark. 699; Van Buren v. Digges, 11 How. 461; Van Epps v. Harrison, 5 Hill, 63; Withers v. Greene, 9 How. 213; Wynn v. Hiday, 2 Blackf. 123; Elminger v. Drew, 4 McLean, 388; Washburn v. Picot, 3 Dev. 390; Pulsifer v. Hotchkiss, 12 Conn. 234; Avery v. Brown, 31 Conn. 398; Peden v. Moore, 1 Stew. & Port. 71.

<sup>3</sup> Davis v. Dickey, 23 Ala. 848; Grisham v. Bodman, 111 Ala. 194, 20 So. Rep. 514.

<sup>4</sup> Harman v. Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272.

is in accordance with the English rule; the damages are reduced by showing how much less the article is worth by reason of the breach of warranty; in other words, the plaintiff having failed to perform the agreement which was the consideration of the defendant's promise, the judicial inquiry is what is the property or service which the defendant has received worth. Thus, A. sold B., for 95*l.*, two pictures, representing them to be "a couple of *ponsins*;" they were in fact not originals, but very excellent copies. B. did not offer to return them, and it was held that if the jury thought that he believed from the representation of A. that they were originals, he was not bound to pay the price agreed; but that, as he kept them, he was liable to pay such sum as the jury might consider to be their value.<sup>1</sup> In an English case<sup>2</sup> Parke, B., said: "Formerly it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the article or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it and seek his remedy on the plaintiff's contract of warranty. In the other case the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the [267] payment of the stipulated price, otherwise, the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant is obliged to pay it, and recover for any breach of contract on the other side. But after the

<sup>1</sup> *Lomi v. Tucker*, 4 C. & P. 15; *De 259*; *Street v. Blay*, 2 B. & Ad. 456; *Sewhanbery v. Buchanan*, 5 C. & P. *Mondel v. Steel*, 8 M. & W. 858.  
<sup>2</sup> *Mondel v. Steel*, *supra*.

343; *Poulton v. Lattimore*, 9 B. & C.



case of *Basten v. Butter*,<sup>1</sup> a different practice, which had been partially adopted before in the case of *King v. Boston*,<sup>2</sup> began to prevail, and being attended with much practical convenience has been since generally followed: and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value.<sup>3</sup> The same practice has not, however, extended to all cases of work and labor, as for instance that of an attorney,<sup>4</sup> unless no benefit whatever has been derived from it; nor in an action for freight.<sup>5</sup> It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above mentioned as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner or goods to be delivered according to a sample;<sup>6</sup> where the party may refuse to receive or may return in a reasonable time if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat*; whereas, in a case of delivery with a warranty of a specific chattel there is no power of returning and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption. It must, however, be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant in all of these not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains or is ca- [268] pable of obtaining an abatement of price on that account he must be considered as having received satisfaction for the

<sup>1</sup> 7 East, 479.

<sup>2</sup> 7 East, 481, note.

<sup>3</sup> *Kist v. Atkinson*, 2 Camp. 63; *Thornton v. Place*, 2 M. & Rob. 218.

<sup>4</sup> *Templer v. McLachlan*, 2 N. R. 136.

<sup>5</sup> *Sheels v. Davies*, 4 Camp. 119.

<sup>6</sup> *Germaine v. Burton*, 3 Stark. 32.

contract and is precluded from recovering in another action to that extent, but no more." The defendant was not entitled to show damages resulting from such breach nor the breach of any other stipulation.<sup>1</sup>

<sup>1</sup> Francis v. Baker, 10 Ad. & E. 642; Bartlett v. Holmes, 13 C. B. 630; Davis v. Hedges, L. R. 6 Q. B. 687.

In McAllister v. Reab, 4 Wend. 490, the theory of recoupment is thus discussed by Marcy, J.: "Upon what principle are the damages for the breach of warranty allowed in a case where there is fraud to be given in evidence to reduce the recovery below the stipulated price? Not on the ground of (statutory) set-off, because these damages are unliquidated. Is it upon the ground that the contract is destroyed by the fraud? If it is rendered void, upon what principle can the vendor recover at all? I know it has been said he recovers upon a *quantum meruit* or *quantum valebat*; but if there was no contract by reason of his fraud, there was no sale; no passing of title. Can an implied sale be set up in lieu of the express one? This, I think, may well be doubted, although the express contract may be void. The case of Beecker v. Vrooman (13 Johns. 302) seems to have been put on the ground that the sale is valid. The language of the court does not countenance the idea that the question in that case was the mere value of the horse. It is there intimated that a different rule now prevails from what formerly governed, which commends itself to the court, because it is calculated to do *final* and complete justice between the parties, most expeditiously and least expensively; but if the parties were proceeding without regard to the express contract upon an implied one, and were only establishing the true value of the horse, there was no new rule, and the language of the court was not

very appropriate to the question before them. In the case of Leggett v. Cooper (2 Starkie N. P. 103), where the counsel for the defendant resisted the recovery on the contract for the sale of hops on account of fraud, Lord Ellenborough said, 'if there is no contract for the sale of the goods at the stipulated price, there is no contract upon the *quantum meruit* for goods sold and delivered.' The action in the case of Frisbee v. Hoffnagle (11 Johns. 50) was on a note for the consideration of a deed with warranty for land. The defense was that the vendor had no title, and it was allowed to prevail, not upon the ground that the contract of sale was invalid by reason of fraud, but for the purpose of avoiding circuity of action. The decision in the case of Spalding v. Vandercook (2 Wend. 431) does not, I apprehend, proceed on the ground of fraud alone. The consideration of the note was the fulfillment of the contract to deliver barrels. If the whole contract was cut up by the fraudulent conduct of the plaintiff, the note was entirely without consideration; but it was not so considered. So in the case of Burton v. Stewart (3 Wend. 236, 20 Am. Dec. 692), there was fraud in the sale of the horse, yet the note given on the sale was not adjudged to be without consideration. The contract was broken, but it had a valid existence; and the court entertained no doubt in that case that if there had been a proper notice the amount of recovery would have been greatly abated by the proof of what was offered; it was, however, rejected for the want of such notice." He concludes that

§ 171. **Same subject.** It is true that the plaintiff's [269] breach of stipulations in favor of the defendant impairs the consideration of his agreement in favor of the plaintiff; but the defense of recoupment is not based on the principle of treating the defendant as relieved from his obligation to perform [270] his undertaking because the consideration is impaired. On the contrary, it is based on the opposite principle, namely, the enforcement of the contract on both sides, and that the damages which the plaintiff has sustained from the breach of the engagements in his favor shall, in whole or in part, be [271] compensation, by allowance in favor of the defendant, and application thereto of such damages as he has suffered from the infraction of the correlative duties and stipulations of the plaintiff which were the consideration. The law will [272] *cut off* so much of the plaintiff's claim as the cross-damages may come to.<sup>1</sup> Wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other.<sup>2</sup> It is not a bar to the plaintiff's action like the technical plea in avoidance of circuity of action, but in pursuance of the same policy of the law it seeks to satisfy and discharge the whole or a part of the plaintiff's claim with damages for which he is liable in respect of the same transaction.<sup>3</sup>

§ 172. **Constituent features of recoupment.** For the purpose of discussing the principal constituent features of recoupment the following propositions are sufficiently comprehensive: 1. The claim or demand for which the defendant seeks to recoup must be a valid cause of action upon which a separate suit might be maintained against the party beneficially interested in the plaintiff's action, or his assignor. 2. It must arise from the same subject-matter or spring out of the same contract or transaction on which the plaintiff relies to maintain his action. 3. It is immaterial whether it be in itself or is set up

the recovery of the plaintiff is based on the express contract, and the amount of it reduced by the allowance of damages on the defendant's cross-claim to save a multiplicity of actions, and as a substitute for a cross-action by the defendant.

<sup>1</sup> *Ives v. Van Epps*, 22 Wend. 155, 156; *McAllister v. Reab*, 4 Wend.

483; *Reab v. McAlister*, 8 Wend. 109; *Batterman v. Pierce*, 3 Hill, 171.

<sup>2</sup> *Minnaugh v. Partlin*, 67 Mich. 391, 34 N. W. Rep. 717; *Grant v. Button*, 14 Johns. 377; *Gillespie v. Torrance*, 25 N. Y. 306, 309, 82 Am. Dec. 355; *Price's Ex'rs v. Reynolds*, 39 N. J. L. 171.

<sup>3</sup> *McCullough v. Cox*, 6 Barb. 387.

as a defense against a claim for liquidated or unliquidated damages. . Nor is it necessary that the claims on both sides be of the same nature. 4. Generally it is available only as defense, for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess.<sup>1</sup> 5. A defendant has an election to use such a cross-demand as a defense or bring a separate action upon it; but he will not have the election to set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. 6. When made the subject of recoupment the defendant assumes the burden of proof in respect to it, and the same rule or measure of damages applies, subject to the limitation just stated, as would be applicable if the defendant had brought a separate action. 7. When submitted as a subject of recoupment the judgment will be a bar to any other suit or recoupment upon it.

[273] § 173. **Remedy by counter-claim.** The counter-claim of the code includes recoupment and is more comprehensive; and the remedy by both has been made more useful and complete by statutory provision against voluntary discontinuance of the action by the plaintiff without the defendant's consent after this defense has been interposed, and for judgment on the adverse claim, if any amount is established after satisfying the plaintiff's claim, or where no claim in favor of the plaintiff is adjudged.

§ 174. **Validity of claim essential.** The claim or demand to be recouped must be a valid cause of action for which a separate suit could be maintained.<sup>2</sup> Hence it is essential that

<sup>1</sup> An exceptional view is held in *Fuller*, 80 N. Y. 312; *Lennon v. New Hampshire*, the defendant being permitted to recover an affirmative judgment against the plaintiff if he shows that he is entitled to it. *Johnson v. White Mountain Creamery Ass'n*, 68 N. H. 437, 36 Atl. Rep. 13, 73 Am. St. 610. This is perfectly logical on the theory of avoiding circuity of action.

<sup>2</sup> *Reilly v. Lee*, 85 Hun, 315, 32 N. Y. Supp. 967, affirmed without opinion, 155 N. Y. 691; *Walker v. Millard*, 29 N. Y. 375; *Woodward v. Smith*, 124 N. Y. 578, 27 N. E. Rep. 243; *Peck v. McCormick Harvesting Machine Co.*, 94 Ill. App. 586, 196 Ill. 295, 63 N. E. Rep. 731; *Osgood v. Bauder*, 82 Iowa, 171, 47 N. W. Rep. 1001; *Howell v. Dimock*, 15 App. Div. 102, 44 N. Y. Supp. 271; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 76 Am. St. 433, 56 N. E. Rep. 198; *Harper v. Moffat Cycle Co.*, 151 Ill. 84, 100, 37 N. E. Rep. 656; *George H. Hess Co. v. Dawson*, 149 Ill. 138, 36 N. E. Rep. 557; *Davidson v.*

the subject of it be such as the court in which it is pleaded has jurisdiction of;<sup>1</sup> that the damages set up were not incurred through the defendant's fault or negligence;<sup>2</sup> that the contract sued upon and out of which the claim arises is valid;<sup>3</sup> that the plaintiff is a party subject to suit;<sup>4</sup> that the allowance of the counter-claim will not deprive the plaintiff of the exemptions given him by statute.<sup>5</sup>

Reduction of damages may often be claimed upon facts which do not constitute a cause of action in favor of the defendant. Of this class and nature are those provable in *mitigation of damages*. The distinction is important; for it is necessary to use the latter in defense; the benefit of such facts will be lost if they are not then introduced. But if the defense consists of a substantive cause of action it will not be lost or barred by the defendant failing to put it forward when there is an opportunity to make it available. The fact that the defendant has the option to avail himself of matter of recoupment or bring a cross-suit upon it necessarily implies that such matter constitutes a cause of action.<sup>6</sup> In an action to recover for labor, if the benefit of the labor is lost by causes for which the plaintiff would be answerable in a cross-action, the same matter which would support a cross-action may be given in evidence in defense of the suit to recover

Rountree, 69 Wis. 655, 34 N. W. Rep. 906; Sylte v. Nelson, 26 Minn. 105, 1 N. W. Rep. 811; Rhymney R. Co. v. Rhymney Iron Co., 25 Q. B. Div. 146; Barnes v. McMullins, 78 Mo. 260; Widrig v. Taggart, 51 Mich. 103, 16 N. W. Rep. 251, and cases cited to this section.

<sup>1</sup> Cragin v. Lovell, 88 N. Y. 258.

<sup>2</sup> Provenzano v. Thayer Manuf. Co., 9 Daly, 90.

<sup>3</sup> Ryan v. Dumphy, 4 Mont. 342, 354.

<sup>4</sup> A tax is not a debt or obligation to pay money founded upon contract and cannot be counter-claimed against. Gatling v. Commissioners, 92 N. C. 536, 53 Am. Rep. 432; Cobb v. Elizabeth City, 75 N. C. 1; Finnegan v. Fernandina, 15 Fla. 379.

A defendant cannot plead a counter-claim against the state without its consent. State v. Bradley, 37 La. Ann. 623; People v. Denison, 84 N. Y. 272; Battle v. Thompson, 65 N. C. 406.

A set-off cannot be maintained or a debt contracted by the plaintiff during infancy and not ratified by him after becoming of full age. Rawley v. Rawley, 1 Q. B. Div. 460; Widrig v. Taggart, 51 Mich. 103, 16 N. W. Rep. 251.

<sup>5</sup> Bauer v. Teasdale, 25 Mo. App. 25; Curlee v. Thomas, 74 N. C. 51; Wilson v. McElroy, 32 Pa. 82.

<sup>6</sup> Brown v. Gallaudet, 80 N. Y. 413; Gillespie v. Torrance, 25 id. 309. See Houston v. Young, 7 Ind. 200; Clark v. Wildridge, 5 id. 176.

payment.<sup>1</sup> "That doctrine (of recoupment) does not rest on the nature of the right which the plaintiff has in the contract which he seeks to enforce, nor on the fact that his interest in it is the same at the time of suit brought as when it was originally entered into. The essential elements on which its application depends are two only. The first is that the damages which the defendant seeks to set off shall have arisen from the same subject-matter or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain [274] his action. The other is that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off, or defense to the contract declared on, shall operate to avoid circuitry of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as those relied on to defeat the action."<sup>2</sup>

§ 175. **Parties.** The cause of action set up for recoupment must be one against the party beneficially interested in the plaintiff's action; a claim against the nominal plaintiff personally, when he sues in a fiduciary capacity or for the benefit of another, is not available. Thus, where property attached by an officer upon *mesne* process was replevied from him, and on the failure of the plaintiff in that suit to comply with the judgment for return of the property suit was brought on the bond by the officer, the other party could not recoup the damages adjudged in his favor against such officer for false return on the process upon which he originally attached the property because the damages recovered by the officer on the bond would be held in trust for the benefit of the attaching creditor and his debtor, and the damages sought to be recouped were assessed against him personally for a wrong committed by him.<sup>3</sup> So in action by executors, as such, for the recovery of purchase-money of land sold by them, the purchaser, making no offer or attempt to rescind the contract, cannot avail himself of false and fraudulent representations made by them at the time of the sale in respect to the subject-matter either as a defense or by way of recoupment or counter-claim. His remedy, if he has any, is against the executors personally.<sup>4</sup>

<sup>1</sup> Austin v. Foster, 9 Pick. 341.

<sup>4</sup> Westfall v. Dungan, 14 Ohio St.

<sup>2</sup> Sawyer v. Wiswell, 9 Allen, 39.

276; Cumberland Island Co. v. Bunk-

<sup>3</sup> Wright v. Quirk, 105 Mass. 44.

ley, 108 Ga. 756, 33 S. E. Rep. 183.

See Beckman v. Manlove, 18 Cal. 388.

A plaintiff who sues an assignee

It is not essential to the exercise of the right of recoupment that the suit in which the right is asserted should be brought in the name of the party who is liable for the cross-claim, nor need it be against the party who is entitled to the benefit of such claim. It is enough that the suit is substantially between them; that the claim sued on is subject to this defense, or that the proceeding be of such a nature that the mutual claims can be adjusted in it; that whatever is recovered is enforceable against the property of the party seeking to re- [275] coup, and whatever is deducted upon the cross-claim properly inures to his benefit.<sup>1</sup> By the water-craft law of some states demands of certain descriptions are liens upon and enforceable against the water-craft, which may be discharged by bond or some form of undertaking in behalf of the owners conditioned for the payment of amounts found to be liens. In actions upon such security, or against the water-craft not bonded, any matter of recoupment in respect to the demand alleged to be a lien may be set up.<sup>2</sup> The surety of a principal entitled to recoupment may, as a general rule, avail himself of that defense, because of the natural equity that mutual debts and liabilities growing out of the same transaction shall compensate each

for the benefit of creditors to recover the price of goods is not subject to a counter-claim for damages resulting from the malicious prosecution by him of a former suit for the same cause of action unless it is shown that his *cestuis que trust* participated in or approved his wrongful act. *Gelshenen v. Harris*, 26 Fed. Rep. 680.

If the beneficial interest in a claim or demand remains in the assignor the assignee cannot set it off against the debtor. *Qlmstead v. Scutt*, 55 Conn. 125, 10 Atl. Rep. 519.

<sup>1</sup> In an action by A. against B. and C. they sought to recoup his demand. It appeared that D., who was not a party to the record, was a partner of the defendants in the original contract, was interested in the reduction of A.'s claim and suffered in common with them the damages sought to be recouped. A

recoupment was allowed. *Baltimore United Oil Co. v. Barber*, 2 Mackey (D. C.), 4.

If, contemporaneously with the execution of notes for the purchase-money of land, the parties agree in writing that the vendor shall furnish the vendee a complete chain of title to the land purchased, for the performance of which it is stipulated that the notes shall be bound, the damages resulting from the non-performance of such agreement may be recouped against the notes although the latter were, at the vendor's request, made payable to a third party, no consideration moving from him. *Hooper v. Armstrong*, 69 Ala. 343. See last note.

<sup>2</sup> *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Ward v. Willson*, 3 Mich. 1.

other.<sup>1</sup> In New York, however, this application of recoupment is refused;<sup>2</sup> and so under a Tennessee statute unless the principal gives consent.<sup>3</sup> The prevailing view is that a counter-claim or cross-claim must be against all the plaintiffs and them only and in favor of all the defendants and no others.<sup>4</sup> In an action upon a contract a balance due the defendant upon an unsettled partnership account between the parties, the firm having been dissolved prior to the commencement of the action, is a proper counter-claim.<sup>5</sup> If some of the defendants set up that the contract sued upon was made with them they may plead a counter-claim though the other defendants have no interest in it.<sup>6</sup> Where the plaintiff's conduct indicates that he considered the defendants as the parties with whom he was dealing and he has sued them both he cannot controvert their right to establish a counter-claim.<sup>7</sup> In an action brought by an executor or administrator upon a contract made by him after the death of his testator or intestate or to recover assets belonging to the estate in the hands of a third person a claim due from the deceased to the defendant cannot be counter-claimed. "The reason of the rule is that in all such cases the allowance of such set-off or counter-claim would necessarily destroy the equal and just distribution of the assets be-

<sup>1</sup> *Reeves v. Chambers*, 67 Iowa, 81, 24 N. W. Rep. 602; *McHardy v. Wadsworth*, 8 Mich. 349; *Waterman v. Clark*, 76 Ill. 428. See *Hobbs v. Duff*, 23 Cal. 596.

<sup>2</sup> *Lasher v. Williamson*, 55 N. Y. 619; *Gillespie v. Torrance*, 25 id. 306.

<sup>3</sup> *Phoenix Iron Works Co. v. Rhea*, 98 Tenn. 461, 40 S. W. Rep. 482.

<sup>4</sup> *Brown v. Morris*, 83 N. C. 221; *Sloteman v. Thomas & W. Manuf. Co.*, 69 Wis. 499, 34 N. W. Rep. 225; *Chase v. Evoy*, 58 Cal. 348; *Jenkins v. Barrows*, 73 Iowa, 488, 35 N. W. Rep. 510; *Hopkins v. Lane*, 81 N. Y. 501; *McCulloch v. Vibbard*, 51 Hun, 227, 4 N. Y. Supp. 202; *Tomlinson v. Nelson*, 49 Wis. 679, 6 N. W. Rep. 366; *Kirby v. Spiller*, 83 Ala. 481, 3 So. Rep. 700; *Wood v. Brush*, 72 Cal. 224, 13 Pac. Rep. 627; *Thalheimer v.*

*Crow*, 13 Colo. 397, 22 Pac. Rep. 779; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. Rep. 180, 11 id. 599; *City Council of Montgomery v. Montgomery Water-works*, 79 Ala. 233; *Copeland v. Young*, 21 S. C. 275; *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. Rep. 405; *King v. Wise*, 43 Cal. 628.

An individual demand cannot be used as a counter-claim to a joint indebtedness unless the insolvency of the plaintiff is shown. *Collier v. Erwin*, 3 Mont. 142; *Kemp v. McCormick*, 1 id. 420.

<sup>5</sup> *Waddell v. Darling*, 51 N. Y. 327. See *Pendergast v. Greenfield*, 40 Hun, 494.

<sup>6</sup> *Clegg v. Cramer*, 32 Hun, 162.

<sup>7</sup> *Drew v. Edmunds*, 60 Vt. 401, 6 Am. St. 122, 15 Atl. Rep. 100.



longing to the estate among the creditors in every case where the assets were insufficient to pay all the debts of the deceased.”<sup>1</sup> An administrator who is sued upon a personal claim cannot counter-claim a debt which is due from the plaintiff to him in his representative capacity.<sup>2</sup> Under a statute which provides that in an action brought by an executor or administrator in his representative capacity a demand against the decedent belonging at the time of his death to the defendant may be set up as a counter-claim, the wrongful acts of an executor cannot give the defendant a right to counter-claim against a demand owing to the testator in his life-time.<sup>3</sup>

§ 176. **Same subject.** The question arose in *Newfoundland v. Newfoundland R. Co.*<sup>4</sup> whether a right of set-off existing in favor of the government was available against such of the plaintiffs as were assignees of the original corporation. The facts were that the plaintiff was incorporated for the purpose of constructing and working a railway in pursuance of a contract with the government, for which the latter was to pay a subsidy and grant lands. The assignees took whatever right the company had to the subsidy and the grants of land in respect to a particular portion of the road. The contention of the plaintiff was that the government was bound to pay a certain amount of subsidy and to make grants of land for a completed portion of the road, though it was not finished as a whole. This was disputed, but if such liability existed it was asserted that the government could set up counter-claims against the company for its breach of contract in not completing the road. It was held by the privy council that the counter-claim was good as against the assignees of the company, it and the claim having their origin in the same

<sup>1</sup> Per Taylor, J., in *McLaughlin v. Winner*, 63 Wis. 120, 124, 53 Am. Rep. 273, 23 N. W. Rep. 402, citing *Alldrich v. Campbell*, 4 Gray, 284; *Smith v. Boyer*, 2 Watts, 173; *Aiken v. Bridgman*, 37 Vt. 249; *Woodward v. McGaugh*, 8 Mo. 161; *Newhall v. Turney*, 14 Ill. 338; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Lawrence v. Vilas*, 20 Wis. 381, 389-391; *Lombarde v. Older*, 17 Beav.

542; *Wrout v. Dawes*, 25 id. 369; *Root v. Taylor*, 20 Johns. 137; *Steel v. Steel*, 12 Pa. 64; *Shipman v. Thompson*, Willes, 103. *Thompson v. Whitmarsh*, 100 N. Y. 36, 2 N. E. Rep. 173, is to the same effect.

<sup>2</sup> *Gourley v. Walker*, 69 Iowa, 80, 28 N. W. Rep. 444.

<sup>3</sup> *Wakeman v. Everett*, 41 Hun, 278.

<sup>4</sup> 12 App. Cas. 199.

portion of the contract and the obligations which gave rise to them being closely intertwined. "The claim of the government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another."<sup>1</sup> Where the plaintiff sues an assignee and is not entitled to protection as a *bona fide* holder of negotiable paper, his action is subject to any defense by way of recoupment which would be good against the party to whom the plaintiff's demand accrued.<sup>2</sup> Where a note for the price of property sold was made payable to the vendor's wife, and no portion of the consideration moved from her, the note was subject to the same defense by way of recoupment for the vendor's fraud in the sale as if it had been made payable to himself.<sup>3</sup>

**§ 177. Maturity of claim or demand; statute of limitations.** Must the matter of recoupment be a mature cause of action at the time of the commencement of the plaintiff's action, or will it be sufficient that it is such at the time of pleading? Campbell, J.,<sup>4</sup> said: "The purpose of recoupment [276] would be defeated if the party cannot be allowed to plead what he might, at the time of pleading, have declared upon. The object of this practice is to diminish litigation by consolidating controversies into one action. The whole doctrine

<sup>1</sup> If the party who agrees to perform makes an assignment of the entire contract before any money is due under it the other party may recoup his damages for a breach thereof by the assignors. *Smith v. Wall*, 12 Colo. 363, 21 Pac. Rep. 42.

<sup>2</sup> *Wood v. Brush*, 72 Cal. 224, 13 Pac. Rep. 627; *McKnight v. Devlin*, 52 N. Y. 399, 11 Am. Rep. 715; *Hinsdell v. Weed*, 5 Denio. 172; *Rockwell v. Daniels*, 4 Wis. 432.

<sup>3</sup> *Kelly v. Pember*, 35 Vt. 183.

<sup>4</sup> In *Platt v. Brand*, 26 Mich. 175.

is one of the equitable outgrowths of the improvement of legal practice, and no obstacle should be thrown in the way of its encouragement. Our legislation has indicated this design by enlarging the defense and permitting defendants to recover damages beyond the plaintiff's claim. We do not feel disposed to accept any technical doctrines which would prevent its full efficacy unless compelled by a weight of authority which we do not find here." But it was said by Jarvis, C. J.,<sup>1</sup> "It seems to me we should carry the doctrine respecting the avoiding of circuitry of action very much further than any case has yet carried it if we were to hold that the damages may be reduced by showing a breach of the contract on the plaintiff's part subsequently to the commencement of the plaintiff's action. There are many cases where circumstances existing before action brought have been allowed to be given in evidence to mitigate or reduce the damages; but none that I am aware of where matters arising after action brought have been so received." Under the English judicature act of 1873<sup>2</sup> relief can be given on a counter-claim in respect of a cause of action accrued to the defendant subsequently to the issue of the writ in the original suit.<sup>3</sup> It had previously been ruled otherwise.<sup>4</sup> The later case is rested on the generality of the language of the statute, the orders made pursuant thereto and the nature of a counter-claim which had been before spoken of as being an wholly independent suit from the claim.<sup>5</sup> It is now settled in England that a counter-claim must be treated as if it were a proceeding in an action, though it is not the latter because it is not commenced by a writ or summons, and that the plaintiff cannot after a counter-claim has been delivered discontinue his

<sup>1</sup> In *Bartlett v. Holmes*, 13 C. B. 630.

<sup>2</sup> Sec. 24, subsec. 3: "The said courts respectively, and every judge thereof, shall also have the power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his plead-

ing, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner."

<sup>3</sup> *Beddall v. Maitland*, 17 Ch. Div. 174.

<sup>4</sup> *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. Div. 713.

<sup>5</sup> *Winterfield v. Bradnum*, 3 Q. B. Div. 324; *Stooke v. Taylor*, 5 id. 569.

action so as to prevent the defendant from enforcing his cause of action.<sup>1</sup> The weight of authority in America is that a demand which is not due at the time the action was brought cannot be counter-claimed or set off.<sup>2</sup> The codes of some states express that the right to counter-claim must exist at the commencement of the action.<sup>3</sup> This means that it must then exist in the hands of those who plead it.<sup>4</sup> In New York in an action for rent the tenant cannot recoup his damages for a breach of covenant on the part of the plaintiff after the commencement of the suit.<sup>5</sup> But in a later case the court of appeals affirmed a judgment on a counter-claim for conversion of property after the commencement of the action.<sup>6</sup> The court say: "Strictly speaking, the act of the plaintiff in procuring and serving the injunction would, ordinarily, be an act at or after the commencement of the action, and therefore one the damages for which could not be set up as a counter-claim in a pleading which is presumed to state the claims of the parties as existing at the time of bringing the suit; but as the act of the plaintiff related to the very property which was the subject of the action and materially affected the defendant's rights and defense therein, I do not see why it could not have been set up in a subsequent or supplemental answer and have thus been rendered effectual to the defendant."

The connection between a plaintiff's cause of action and a defendant's cross-claim is so close that until the former is barred by the statute of limitations the latter is available.<sup>7</sup> "Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action, as damage

<sup>1</sup> McGowan v. Middleton, 11 Q. B. Div. 464, overruling Vavasour v. Krupp, 15 Ch. Div. 474.

<sup>2</sup> Ellis v. Cothran, 117 Ill. 458, 3 N. E. Rep. 411; Orton v. Noonan, 29 Wis. 541; Simpson v. Jennings, 15 Neb. 671, 19 N. W. Rep. 473; Tessier v. Englehart, 18 Neb. 167, 24 N. W. Rep. 734; Hogan v. Kirkland, 64 N. C. 250; Lee v. Eure, 93 id. 5, 9.

<sup>3</sup> Davis v. Frederick, 6 Mont. 300, 12 Pac. Rep. 664.

<sup>4</sup> Mayo v. Davidge, 44 Hun, 342.

<sup>5</sup> Harger v. Edmonds, 4 Barb. 256.

<sup>6</sup> Ashley v. Marshall, 29 N. Y. 494.

<sup>7</sup> Beecher v. Baldwin, 55 Conn. 419, 12 Atl. Rep. 401, 3 Am. St. 57; Brumble v. Brown, 71 N. C. 513; Stillwell v. Bertrand, 22 Ark. 375; Eve v. Louis, 91 Ind. 457; Walker v. Clements, 15 Q. B. 1046.

growing out of the same transaction. Thus, in an action to recover the price of goods sold, unsoundness may be set up by way of defense although an action to recover damages is barred."<sup>1</sup> In an action on a note a total failure of consideration and a parol warranty of the property for which the obligation was given were pleaded in defense, and the latter was sustained, although the period for bringing an action upon the parol agreement had passed.<sup>2</sup> If a contract is not satisfactorily performed, the right to recover under it is qualified. To the extent that the contractee has been injured by the method of the contractor's performance or by his neglect to perform he may defeat the latter's demand. If the statute of limitations does not bar the contractor the other party may plead a counter-claim. The statute is tolled by the commencement of an action, and though the counter-claim is not pleaded until more than the statutory period fixed for bringing an action on the contract has gone by, it is in time if it is pleaded within the period fixed for answering the complaint.<sup>3</sup> In Pennsylvania the running of the statute is not stopped until the defendant pleads his set-off or gives the plaintiff notice of it.<sup>4</sup>

**§ 178. Cross-claim must rest on contract or subject-matter of action.** It must arise from the same subject- [277] matter, or spring out of the same contract or transaction on which the plaintiff relies to maintain his action.<sup>5</sup> The same thing is substantially necessary to constitute one branch of the counter-claim of the modern codes in which it is required that it arise out of the same transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action.<sup>6</sup>

<sup>1</sup> Wood's Lim., § 282; Riddle v. Kreimbricht, 12 La. Ann. 297; Lastrapes v. Rocquet, 23 id. 68.

<sup>2</sup> Morrow v. Hanson, 9 Ga. 398, 54 Am. Dec. 346.

<sup>3</sup> Herbert v. Dey, 15 Abb. N. C. (N. Y.) 172.

<sup>4</sup> Gilmore v. Reed, 76 Pa. 462.

<sup>5</sup> Sawyer v. Wiswell, 9 Allen, 39; Logie v. Black, 24 W. Va. 1, 20; Bozarth v. Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; Gilchrist v. Partridge,

73 Me. 214; Washington v. Timberlake, 74 Ala. 259; Keegan v. Kinnare, 123 Ill. 280, 14 N. E. Rep. 14; Forrest v. Johnson, 100 Mich. 321, 58 N. W. Rep. 1005.

<sup>6</sup> Xenia Branch Bank v. Lee, 7 Abb. Pr. 372; Epperly v. Bailey, 3 Ind. 72; Slayback v. Jones, 9 Ind. 472; Barhyte v. Hughes, 33 Barb. 320; Bazemore v. Bridgers, 105 N. C. 191, 10 S. E. Rep. 888; Demartin v. Albert, 68 Cal. 277, 9 Pac. Rep. 157;

§ 179. **Recoupment for fraud, breach of warranty, negligence, etc.** If a party in negotiating a contract commits an actionable fraud upon the other contracting party touching the subject of their negotiation the latter, though he has not exercised his privilege to repudiate the contract on the discovery of the fraud, may recoup his damages therefor in any action brought by the guilty party upon the contract. Such a cross-claim does not grow out of the contract, but it is part of the same transaction and is connected with the subject of the action.<sup>1</sup> A. executed in February a memorandum under

Allen v. Coates, 29 Minn. 46, 11 N. W. Rep. 182; Schmidt v. Bickenbach, 29 Minn. 122, 12 N. W. Rep. 349; Standley v. Northwestern Mut. L. Ins. Co., 95 Ind. 254; Lee v. Eure, 93 N. C. 5; Wilkerson v. Farnham, 82 Mo. 672; Clark's Cove Guano Co. v. Appling, 33 W. Va. 470, 10 S. E. Rep. 809; Logie v. Black, 24 W. Va. 1; Wigmore v. Buell, 116 Cal. 24, 47 Pac. Rep. 927.

If the plaintiff fails to prove the contract upon which he sues the defendant cannot prove another and different contract and recoup damages for the breach thereof. Halderman v. Berry, 74 Mich. 424, 42 N. W. Rep. 57; Morehouse v. Baker, 48 Mich. 335, 12 N. W. Rep. 170; Holland v. Rea, 48 Mich. 218, 12 N. W. Rep. 167; Brighton Bank v. Sawyer, 132 Mass. 185; Bozarth v. Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; The Zouave, 29 Fed. Rep. 296; The C. B. Sanford, 22 id. 863.

<sup>1</sup> Barbour v. Flick, 126 Cal. 628, 59 Pac. Rep. 122; Bell v. Sheridan, 21 D. C. 370; Johnson v. St. Louis Butchers' Supply Co., 60 Ark. 387, 30 S. W. Rep. 429; Walker v. France, 112 Pa. 203, 5 Atl. Rep. 208; Dowagiac Manuf. Co. v. Gibson, 73 Iowa, 525, 6 Ark. St. 697, 35 N. W. Rep. 603; Birdsey v. Butterfield, 34 Wis. 52; Van Epps v. Harrison, 5 Hill, 63; Myers v. Estell, 47 Miss. 4, 17, 21; Estell v. Myers, 54 id. 174, 56 id. 800;

Kelly v. Pember, 35 Vt. 183; Kennedy v. Crandall, 3 Lans. 1; Rotan v. Nichols, 22 Ark. 244; Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Timmons v. Dunn, 4 Ohio St. 680; Avery v. Brown, 31 Conn. 398; Caldwell v. Sawyer, 30 Ala. 283; Cage v. Phelps, 38 Ala. 383; Moberly v. Alexander, 19 Iowa, 162; Johnson v. Miln, 14 Wend. 195; President, etc. v. Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214; Light v. Stoeber, 12 S. & R. 431; Haynes v. Harper, 25 Ark. 541; Wardell v. Fosdick, 13 Johns. 325, 78 Am. Dec. 383; Brown v. Tuttle, 66 Barb. 169; Hogg v. Cardwell, 4 Sneed, 151; Nelson v. Johnson, 25 Mo. 430; Withers v. Greene, 9 How. 213; Estep v. Fenton, 66 Ill. 467; Sawyer v. Wiswell, 9 Allen, 39; Bradley v. Rea, 14 id. 20; Mixer v. Coburn, 11 Met. 561, 45 Am. Dec. 230; Westcott v. Nims, 4 Cush. 215; Cook v. Castner, 9 Cush. 266; Harrington v. Stratton, 22 Pick. 510; Hall v. Clark, 21 Mo. 415; Rawley v. Woodruff, 2 Lans. 419; More v. Rand, 60 N. Y. 208; Price v. Lewis, 17 Pa. 51, 55 Am. Dec. 536; Graham v. Wilson, 6 Kan. 489; Allen v. Shackelton, 15 Ohio St. 145; Sumpter v. Welsh, 2 Bay, 558; Wheat v. Dotson, 12 Ark. 699; Tunno v. Fludd, 1 McCord, 121; Abercrombie v. Owings, 2 Rich. 127; Adams v. Wylie, 1 Nott & McC. 78; McFarland v. Carver, 34 Mo. 195; Christy v. Ogle, 33 Ill. 295; Reynolds

seal stating that he had hired of W. a certain lot for one [278] year from the 1st of May following, at a rent of \$1,000. He was induced to make the contract by the fraudulent representations of W. that the lot embraced a certain other parcel of land which belonged to the corporation. A. discovered the fraud before the 1st of May, and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole and occupied it during the year. It was held in an action by W. for the rent that A. was entitled to a deduction by reason of the fraud of at least what he was obliged in good faith to pay for the corporation lease.<sup>1</sup> And in action for fraudulent representations made on the exchange of property the defendant was allowed to recoup his damages resulting therefrom.<sup>2</sup> Where an action was brought to recover a balance due on a contract of sale of two separate patented processes, described and contracted for in a single written agreement for an entire sum payable in instalments, the vendee was entitled to set off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the amount paid for both.<sup>3</sup> If several distinct purchases are made at the same time, though by different instruments, they will be regarded for the purposes of recoupment as being connected.<sup>4</sup> So, in actions for the price of property sold, damages for breach of any warranty made by the vendor of the property, whether it be express or implied, may be recouped,<sup>5</sup> so far as he is not

v. Cox, 11 Ind. 262; Cox v. Reynolds, 7 id. 257; House v. Marshall, 18 Mo. 369; Shute v. Taylor, 5 Met. 61; Owens v. Rector, 44 Mo. 389; James v. Lawrenceburgh Ins. Co., 6 Blackf. 525; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; White v. Sutherland, 64 Ill. 181; Gibson v. Marquis, 29 Ala. 668; Isham v. Davidson, 52 N. Y. 237; Simmons v. Cutreer, 12 Sm. & M. 584; Holton v. Noble, 83 Cal. 7, 23 Pac. Rep. 58.

<sup>1</sup> Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305;

Holton v. Noble, 83 Cal. 7, 23 Pac. Rep. 58.

<sup>2</sup> Carey v. Guillow, 105 Mass. 18, 7 Am. Rep. 494; Chandler v. Childs, 42 Mich. 128, 3 N. W. Rep. 297.

<sup>3</sup> Rawley v. Woodruff, 2 Lans. 419.

<sup>4</sup> Benjamin v. Richards, 51 Mich. 110, 16 N. W. Rep. 255.

<sup>5</sup> Wilson v. Hughes, 94 N. C. 182; Bitting v. Thaxton, 72 id. 541; Walsh v. Hall, 66 id. 233; Hurst v. Everett, 91 id. 399; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696; Spalding v. Vandercook, 2 Wend. 431; Hoover v. Peters, 18 Mich. 51; McAllister v. Reab, 4 Wend. 483; Reab

otherwise reimbursed for his loss, as by insurance paid in consequence of the destruction of the property.<sup>1</sup>

If there is a sale and delivery of property *in presenti* which is expressly warranted and the warranty is not true, the vendee does not lose his right to recoup the damages by receiving and using the property.<sup>2</sup> In New York, where the contract

v. McAlister, 8 Wend. 109; Herbert v. Ford, 29 Me. 546; Kellogg v. Denslow, 14 Conn. 411; Hitchcock v. Hunt, 28 Conn. 343; Mercer v. Hall, 2 Tex. 284; Mears v. Nichols, 41 Ill. 207, 89 Am. Dec. 381; Miller v. Smith, 1 Mason, 437; Love v. Oldham, 22 Ind. 51; Getty v. Rountree, 2 Pin. 379; McAlpin v. Lee, 12 Conn. 129, 30 Am. Dec. 609; Withers v. Greene, 9 How. 214; Van Buren v. Digges, 11 id. 461; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Deen v. Herrold, 37 Pa. 150; Ketchum v. Wells, 19 Wis. 25; Steigleman v. Jeffries, 1 S. & R. 477, 7 Am. Dec. 626; Murphy v. Gay, 37 Mo. 535; Barth v. Burt, 43 Barb. 623; Brown v. Tuttle, 66 Barb. 169; Westcott v. Nims, 4 Cush. 215; Miller v. Gaither, 3 Bush, 152; Culver v. Blake, 6 B. Mon. 528; McMillion v. Pigg, 3 Stew. 165; Lemon v. Trull, 13 How. Pr. 248; Plant v. Condit, 22 Ark. 454; Jemison v. Woodruff, 34 Ala. 143; Hoe v. Sanborn, 3 Abb. Pr. (N. S.) 189; Harman v. Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272; Rumsey v. Sargent, 21 N. H. 397; Williams v. Miller, 21 Ark. 469; Goodwin v. Morse, 9 Met. 278; Harrington v. Stratton, 22 Pick. 510; Flint v. Lyon, 4 Cal. 17; Dennis v. Belt, 30 Cal. 247; Hodgkins v. Moulton, 100 Mass. 309; Burnett v. Smith, 4 Gray, 50; Allen v. Furbish, id. 504, 64 Am. Dec. 87; Stacy v. Kemp, 97 Mass. 166; Darnell v. Williams, 2 Stark. 166; Parish v. Stone, 14 Pick. 198; Judd v. Dennison, 10 Wend. 513; Murray v. Carlin, 67 Ill. 286; Owens v. Sturges, id. 366; Nixon v. Carson, 38 Iowa, 338; Walker v. Hoisington, 43 Vt. 608; Parker v.

Pringle, 2 Strobb. 242; Babcock v. Trice, 18 Ill. 420.

If several suits are brought in an inferior court on notes given for property which is not of the quality bargained for, the defendant may set up the breach of warranty in each suit until the damages are neutralized, and on appeal and consolidation of the actions the whole damage suffered may be recouped. Hurst v. Everett, 91 N. C. 399.

<sup>1</sup> Eureka Fertilizer Co. v. Baltimore Copper Smelting & Rolling Co., 78 Md. 179, 27 Atl. Rep. 1035.

<sup>2</sup> Getty v. Rountree, 2 Pin. 379; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Dailey v. Green, 15 Pa. 118; Polhemus v. Heiman, 45 Cal. 573; Warder v. Fisher, 48 Wis. 334, 4 N. W. Rep. 470; Vincent v. Leland, 100 Mass. 432; Lewis v. Rountree, 78 N. C. 323; Gurney v. Atlantic, etc. R. Co., 58 N. Y. 358; Day v. Pool, 52 id. 416, 11 Am. Rep. 719.

In Locke v. Williamson, 40 Wis. 377, the property was accepted with knowledge that it was not such as the contract called for. The buyer set up the defect in the quality and the court said: "We have concluded to hold this rule in respect to an executory contract, that when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination and knows of such defects, he must, either when he receives the goods or within a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty, otherwise



of sale is executory and a time is agreed upon for making a test of the property which is the subject of the contract, the acceptance and use of it after the test has been made waives the right to claim a breach of the warranty.<sup>1</sup> This is not the rule in Illinois.<sup>2</sup> If goods are warranted the purchaser may, after he has admitted that they correspond with the contract and promised to pay the purchase price, recoup any damages resulting from a breach of the warranty, or he may, after paying the price, recover such damages in a separate suit.<sup>3</sup> Giving a renewal note after knowledge of the breach of a warranty is presumptive, but not conclusive, evidence of a waiver of the claim for damages.<sup>4</sup> In suits for labor or goods the warranty of either is not a matter altogether collateral; [279] it forms an essential portion of the consideration for the defendant's undertaking, and therefore the breach of it is proper to be shown in reduction of the stipulated price.<sup>5</sup> When damages for the breach of a warranty as to the quality of a chattel are established they are to be applied in reduction of plaintiff's recovery as of the date of the contract.<sup>6</sup>

§ 180. *Same subject.* Whatever the nature of the contract, however numerous or varied its stipulations, and whether they are all written and embodied in one or several instruments, or only partly written or partly implied, if they are connected, so that what is undertaken to be done on one side altogether is the consideration, or part of the consideration, either in prom-

the defects will be deemed waived." See *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129, 33 Am. Rep. 121, 50 N. W. Rep. 988; *Reed v. Randall*, 29 N. Y. 358; *McCormick v. Sarson*, 45 id. 256; *Gaylord Manuf. Co. v. Allen*, 53 id. 515. Compare these New York cases with the two cited above.

<sup>1</sup> *McParlin v. Boynton*, 8 Hun, 449; affirmed by a majority of one and without opinion, 71 N. Y. 604.

<sup>2</sup> *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. 40, 23 N. E. Rep. 598, citing and discussing previous decisions in that state.

<sup>3</sup> *Bretz v. Fawcett*, 29 Ill. App. 319; *Harrington v. Stratton*, 22 Pick. 510; *Hodgkins v. Moulton*, 100 Mass. 309;

*Ruff v. Jarrett*, 94 Ill. 474; *Shackelton v. Lawrence*, 65 id. 175; *Reed v. Hastings*, 61 id. 266.

<sup>4</sup> *Aultman v. Wheeler*, 49 Iowa, 647; *Cantralt v. Fawcett*, 2 Ill. App. 571.

<sup>5</sup> *Allen v. Hooker*, 25 Vt. 137; *Cole v. Colburn*, 61 N. H. 499; *Hoerner v. Giles*, 53 Ill. App. 540; *McCormick Harvesting Machine Co. v. Robinson*, 60 Ill. App. 253; *Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. Rep. 557; *National Oak Leather Co. v. Armour-Cudahy Packing Co.*, 99 Ky. 667, 37 S. W. Rep. 81.

<sup>6</sup> *Wilson v. Reedy*, 33 Minn. 503, 24 N. W. Rep. 491.

ise or performance, for what is engaged to be done on the other, the range of the right of recoupment is co-extensive with the duties and obligations of the parties, respectively, both to do and to forbear,—as well those imposed at first by the language of the contract as those which subsequently arise out of it in the course of its performance.<sup>1</sup> It extends to damages result-  
[280] ing from negligence where care, activity and diligence are required;<sup>2</sup> where damages accrue from excess of action, as

<sup>1</sup> *Green v. Batson*, 71 Wis. 54, 36 N. W. Rep. 849; *Bross v. Cairo & V. R. Co.*, 9 Ill. App. 363; *Wilson v. Greensboro*, 54 Vt. 533; *Babbitt v. Moore*, 51 N. J. L. 229, 17 Atl. Rep. 99; *Deitz v. Leete*, 28 Mo. App. 540; *Logie v. Black*, 24 W. Va. 1, 19; *Brigham v. Hawley*, 17 Ill. 38; *Lee v. Clements*, 48 Ga. 128; *Satchwell v. Williams*, 40 Conn. 371; *Fowler v. Payne*, 49 Miss. 32; *Branch v. Wilson*, 12 Fla. 543; *Mell v. Moony*, 30 Ga. 413; *Rogers v. Humphrey*, 39 Me. 382; *Winder v. Caldwell*, 14 How. 434; *Cherry v. Sutton*, 30 Ga. 875; *Bowker v. Hoyt*, 18 Pick. 555; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Van Buren v. Digges*, 11 How. 461; *Dennis v. Belt*, 30 Cal. 247; *Logan v. Tibbott*, 4 Greene, 389; *Heaston v. Colgrove*, 3 Ind. 265; *Keyes v. Western Vermont Slate Co.* 34 Vt. 81; *Willey v. Fractional School Dist.*, 25 Mich. 419; *Elliot v. Heath*, 14 N. H. 131; *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Walker v. Millard*, 29 N. Y. 375; *Guthman v. Castleberry*, 49 Ga. 272; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Eldred v. Leahy*, 31 Wis. 546; *Whitney v. Meyers*, 1 Duer, 267; *Peden v. Moore*, 1 Stew. & Port. 71, 21 Am. Dec. 649; *Wilder v. Boynton*, 63 Barb. 547; *Cook v. Soule*, 56 N. Y. 420, 45 How. Pr. 340; *Holzworth v. Koch*, 26 Ohio St. 33; *Myers v. Burns*, 33 Barb. 401, 35 N. Y. 269; *Ives v. Van Epps*, 23 Wend. 155; *Warfield v. Booth*, 33 Md. 63; *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec.

538; *Rogers v. Ostrom*, 35 Barb. 523; *Westlake v. De Graw*, 25 Wend. 669; *Goodwin v. Morse*, 9 Met. 278; *Sanger v. Fincher*, 27 Ill. 346; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Turner v. Gibbs*, 50 Mo. 556; *Dermott v. Jones*, 2 Wall. 1; *Overton v. Phelan*, 2 Head, 445; *Bloom v. Lehman*, 27 Ark. 439; *Berry v. Diamond*, 19 Ark. 262; *Desha's Ex'r v. Robinson's Adm'r*, 17 Ark. 228; *Springdale Ass'n v. Smith*, 32 Ill. 252; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *Crouch v. Miller*, 5 Humph. 586; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Lufburrow v. Henderson*, 30 Ga. 482; *Molby v. Johnson*, 17 Mich. 382; *Stow v. Yarwood*, 14 Ill. 424; *Stewart v. Bock*, 3 Abb. Pr. 118; *Hoopes v. Meyer*, 1 Nev. 433; *Caldwell v. Pennington*, 3 Gratt. 91; *Burroughs v. Clancey*, 53 Ill. 30; *Lunn v. Gage*, 37 Ill. 19; *Evans v. Hughey*, 76 Ill. 115; *Hubbard v. Rogers*, 64 Ill. 434; *Eckles v. Carter*, 26 Ala. 563; *Ewart v. Kerr*, 2 McMull. 141; *Moore v. Caruthers*, 17 B. Mon. 669; *Whitbeck v. Skinner*, 7 Hill. 53; *Chatterton v. Fox*, 5 Duer, 64; *Hill v. Southwick*, 9 R. I. 299, 11 Am. Rep. 250; *Fitchburg, etc. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427; *Allen v. McKibbin*, 5 Mich. 449; *Key v. Henson*, 17 Ark. 254; *Hutt v. Bruckman*, 55 Ill. 441; *McDowell v. Milroy*, 69 Ill. 498; *Latham v. Sumner*, 89 Ill. 233; *Cooke v. Preble*, 80 Ill. 381; *Bishop v. Price*, 24 Wis. 480.

<sup>2</sup> *Sinker v. Diggins*, 76 Mich. 557,

where it injuriously transcends the limits of duty or authority;<sup>1</sup> from ignorance, where knowledge and skill are due;<sup>2</sup> and honesty and good faith, being always obligations upon contracting parties, all damages which result from any covinous practice or tort within the scope of the transaction which the plaintiff's action involves may be the subject of recoupment. Thus money paid to contractors by government officers without authority, or in violation, of law may be recovered on a counter-claim in a suit on the contract under which such payment was made.<sup>3</sup> An employer may recoup against a servant's wages not only the damages arising from his negligence and want of skill and knowledge, but for any fraudulent or tortious waste, conversion or destruction of property intrusted to him or placed in his care in the course of his employment.<sup>4</sup> If a servant lives in the family of his employer and while there seduces the latter's daughter, the damages resulting may

43 N. W. Rep. 674; Macgowan v. Whiting, 9 Daly, 86; Whitellegge v. De Witt, 12 Daly, 319; Lee v. Clements, 48 Ga. 128; Fowler v. Payne, 49 Miss. 32; Phelps v. Paris, 39 Vt. 511; Still v. Hall, 20 Wend. 51; Briggs v. Montgomery, 3 Heisk. 673; Denew v. Daverell, 3 Camp. 451; Grant v. Button, 14 Johns. 377; Shipman v. State, 43 Wis. 381; Garfield v. Huls, 54 Ill. 427; Forman v. Miller, 5 McLean, 4218; Doan v. Warren, 11 Up. Can. C. P. 423; McCracken v. Hair, 2 Speer, 256; Marshall v. Hann, 17 N. J. L. 425; Eaton v. Woolly, 28 Wis. 628; Cloyd v. Steiger, 139 Ill. 41, 28 N. E. Rep. 987; Hattin v. Chase, 88 Me. 237, 33 Atl. Rep. 989, quoting the text.

<sup>1</sup> McEwen v. Kerfoot, 37 Ill. 530.

<sup>2</sup> De Witt v. Cullings, 32 Wis. 298; Stoddard v. Treadwell, 26 Cal. 294; Goslin v. Hodson, 24 Vt. 140; Hunt v. Pierpont, 27 Conn. 301; Shipman v. State, 43 Wis. 381; Robinson v. Mace, 16 Ark. 97; Hopping v. Quin, 12 Wend. 517; Gleason v. Clark, 9 Cow. 57; Hill v. Featherstonehaugh, 7 Bing. 569; Cardell v. Bridge, 9

Allen, 355; Eaton v. Woolly, 28 Wis. 628; Whitesell v. Hill, 101 Iowa, 629, 70 N. W. Rep. 750, 37 L. R. A. 830.

<sup>3</sup> Barnes v. District of Columbia, 22 Ct. of Cls. 366; McElrath v. United States, 102 U. S. 426, 440.

<sup>4</sup> Johnson v. White Mountain Creamery Ass'n, 68 N. H. 437, 36 Atl. Rep. 13, 73 Am. St. 610; Barretts, etc. Dyeing Establishment v. Wharton, 101 N. Y. 631, 4 N. E. Rep. 344; Gibson v. Carlin, 13 Lea, 440; Heck v. Shener, 4 S. & R. 249, 8 Am. Dec. 700; Allaire Works v. Guion, 10 Barb. 55; Coit v. Stewart, 50 N. Y. 17; Hatchett v. Gibson, 13 Ala. 587; Pierce v. Hoffman, 4 Wis. 277; Brigham v. Hawley, 17 Ill. 38; Brady v. Price, 19 Tex. 285. See Ward v. Willson, 3 Mich. 1, where it was held that proof that the plaintiff, while employed as a cook on board a boat, wilfully destroyed the hose belonging to the boat should be excluded in an action to enforce the payment of his wages, the tort not appearing to have any connection with his duties as cook. Nashville R. Co. v. Chumley, 6 Heisk. 325.

be recouped in an action to recover wages.<sup>1</sup> The same remedy is available where the employee quits the service without giving the notice required by his contract;<sup>2</sup> and against a pledgee suing for the debt secured by the pledge where he has converted it.<sup>3</sup> So in an action by the pledgor against the pledgee for conversion of the pledge the latter may recoup the amount of the debt secured thereby.<sup>4</sup> Where a carrier injures or loses goods, or any of them, or incurs a liability for negligent delay in transportation and delivery, the damage therefor may be recouped in an action for freight;<sup>5</sup> damages for the culpable negligence of a physician who carries infection from patients having small-pox to the defendant's family, when called to prescribe for other diseases, may be recouped against his charges for services.<sup>6</sup> The remedy extends to the vendor of

<sup>1</sup> *Bixby v. Parsons*, 49 Conn. 483.

<sup>2</sup> *Stockwell v. Williams*, 40 Conn. 371.

<sup>3</sup> *Bulkeley v. Welch*, 31 Conn. 339; *Ainsworth v. Bowen*, 9 Wis. 348; *Harrell v. Citizens' Banking Co.*, 111 Ga. 846, 36 S. E. Rep. 460; *Waring v. Gaskill*, 95 Ga. 731, 22 S. E. Rep. 659.

Where the defendant deposited a bond as collateral security for the payment of his note, and the bond was stolen after the note became due and before it was paid, the value of the bond could not be recouped in a suit on the note. To make the defense of recoupment available some stipulation in the contract sued upon must have been violated by the plaintiff. The deposit of the bond was perhaps a part of the transaction of giving the note, but it was not the same transaction. The note was a contract independently of the pledging of the bond in itself. *Winthrop Bank v. Jackson*, 67 Me. 570, 24 Am. Rep. 56. The same rule was applied where the pledgee sold notes given him to secure the payment of the note in suit, which made no reference to the collateral. *Fletcher v. Harmon*, 78 Me. 465, 7 Atl. Rep. 271.

<sup>4</sup> *Belden v. Perkins*, 78 Ill. 449; *Jar-*

*vis v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *Fowler v. Gilman*, 13 Met. 267; *Work v. Bennett*, 70 Pa. 484; *Brown v. Phillips*, 3 Bush, 656.

The right to recoup does not rest upon the principle of lien; it exists after the lien has been destroyed by a tortious act of the party in whose favor it was originally obtained. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415.

<sup>5</sup> *Empire Transportation Co. v. Bogiano*, 52 Mo. 294; *Ewart v. Kerr*, 2 McMull. 141; *Sears v. Wingate*, 3 Allen, 103; *Boggs v. Martin*, 13 B. Mon. 239; *The Nathaniel Hooper*, 3 Sumn. 542; *Jordan v. Warren Ins. Co.*, 1 Story, 352; *Bradstreet v. Heron*, 1 Abb. Adm. 209; *Fitchburg, etc. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427; *Davis v. Pattison*, 24 N. Y. 317; *Edwards v. Todd*, 2 Ill. 463; *Leech v. Baldwin*, 5 Watts, 446; *Humphrey v. Reed*, 6 Whart. 435; *Hinsdell v. Weed*, 5 Denio, 172. But see *Bornman v. Tooke*, 1 Camp. 377, and *Sheels v. Davies*, 4 Camp. 119; *Mayne on Dam.* 70.

<sup>6</sup> *Piper v. Menifee*, 12 B. Mon. 465, 54 Am. Dec. 547.

rags sold as clean and free from infection and fit to be manufactured into paper if in fact they are infected with small-pox and cause that disease to break out in the paper mill of the vendee, whereby some of his workmen lose their lives and others are disabled, causing a loss of business and increase of expense to the purchaser of the rags.<sup>1</sup> A borrower sued by the lender for conspiracy in failing to satisfy certain prior mortgages with the borrowed funds may set up that the lender had sold his note before due and that his agent converted the borrowed money before its delivery to the borrower, and that the lender is indebted to the borrower to the extent of the value of the note converted.<sup>2</sup>

§ 181. **What acts may be the basis of recoupment.** If the contract has been executed on the part of the plaintiff and, therefore, the defendant's contract sued on is based upon an executed consideration, then any tortious act of the former subsequently impairing, in fact, that consideration has been deemed an independent tort, and not a part of the transaction, or not connected with the subject of the action for breach of the defendant's undertaking.<sup>3</sup> Thus, it has been held to be no defense to an action on a bill of exchange given for the price of goods sold that two months after their delivery to the vendee the vendor forcibly retook possession.<sup>4</sup> But where a note was given for a judgment assigned, proof that [282] the assignor afterwards collected part of the judgment was held a defense *pro tanto* to the note.<sup>5</sup> In an action for the price of specific articles bargained and sold, but not delivered, the defendant may set up by way of recoupment any injury to such articles occasioned by the fault or negligence of the vendor subsequent to the sale and prior to the time of de-

<sup>1</sup> Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 698.

<sup>2</sup> Bowman v. Lickey, 86 Mo. App. 47.

<sup>3</sup> In an action for wages the employer cannot recoup damages for an injury done by the plaintiff beyond the scope of his employment. Nashville R. Co. v. Chumley, 6 Heisk. 327.

Damages for maliciously suing out an attachment are not to be recouped in the same suit because the wrong was in no way connected with the

consideration of the contract sued on. Nolle v. Thompson, 3 Met. (Ky.) 121. Nor for slander in an action by the indorsee before maturity of a note. Lyon v. Bryant, 54 Ill. App. 331.

<sup>4</sup> Stephens v. Wilkinson, 2 B. & Ad. 320, Huelet v. Reyns, 1 Abb. Pr. (N. S.) 27; Slayback v. Jones, 9 Ind. 472. See Martin v. Brown, 75 Ala. 442; Gerding v. Adams, 65 Ga. 79.

<sup>5</sup> Harper v. Columbus Factory, 35 Ala. 127.

livery;<sup>1</sup> for the vendor's duty was to keep the articles sold with ordinary care, and he is responsible for the want of such care or of good faith.<sup>2</sup> So a vendee, when sued for the price of land sold, may recoup for the vendor's tort which diminishes the value of the property purchased,<sup>3</sup> or which consists of carrying away crops or fixtures before the sale is consummated by deed and delivery of possession.<sup>4</sup> Where suit was brought on a note given for wood the maker recouped against the note the amount of his loss because the plaintiff refused to permit him to convert the wood into charcoal on the land on which it was when it was sold, it was not necessary that the wood should be returned, it having been removed and coaled elsewhere.<sup>5</sup> A tenant in common, in control of the premises held in common for the purpose of renting them, when sued by his co-tenant for his share of the rents may counter-claim the damages sustained by the plaintiff's wrongful acts in inducing lessees to leave the premises before their leases expired.<sup>6</sup>

Where a contract for particular works has been entered into, or for service, or for the sale and delivery of property, and there has been a part performance for which an action in general *assumpsit* is maintainable, the special contract is a part of the transaction in question. Although the plaintiff does not bring his action upon it, it is connected with the subject thereof.<sup>7</sup> Though the performance of the plaintiff's part of the contract may at first have been a condition, yet the defendant may waive the right to forfeit the contract for non-performance, and retain his right to damages. These he may recoup in an action on a *quantum meruit* or a *quantum valebat*, or in an action upon the contract.<sup>8</sup> In such cases if the de-

<sup>1</sup> Barrow v. Window, 71 Ill. 214.

<sup>2</sup> McCandlish v. Newman, 25 Pa. 460; Chinery v. Viall, 5 H. & N. 288.

<sup>3</sup> Streeter v. Streeter, 43 Ill. 155.

<sup>4</sup> Gordon v. Bruner, 49 Mo. 570; Grand Lodge v. Knox, 20 Mo. 433; Patterson v. Hulings, 10 Pa. 506; Owens v. Rector, 44 Mo. 389. But see Slayback v. Jones, 9 Ind. 472.

<sup>5</sup> Harman v. Bannon, 71 Md. 429, 18 Atl. Rep. 862.

<sup>6</sup> Dale v. Hall, 64 Ark. 221, 41 S. W. Rep. 761.

<sup>7</sup> Twitty v. McGuire, 3 Murphy, 501; Grannis v. Linton, 30 Ga. 330; Steamboat Wellsville v. Geisse, 3 Ohio St. 333; Bishop v. Price, 24 Wis. 480; Hayward v. Leonard, 7 Pick. 181; Bowker v. Hoyt, 18 Pick. 555; Barber v. Rose, 5 Hill, 76.

<sup>8</sup> Woodrow v. Hawving, 105 Ala. 240, 16 So. Rep. 720; Madison v. Dan-

defendant thinks proper to present his cross-claim by way of recoupment the court will consider the whole contract [283] under which the plaintiff's demand arose, and direct a deduction, from what he would otherwise be entitled to recover, of all damages sustained by the defendant in consequence of the plaintiff's failure to fulfill any or all of the stipulations on his side.<sup>1</sup>

On the sale of a quantity of standing wood the vendor agreed to indemnify the vendees against any damage that might happen to the wood in consequence of the burning of an adjoining fallow. The latter gave their notes for the price; and, afterwards, the fallow being burned over, the wood in question was destroyed by the fire; and it was held, in an action by the vendor upon the note, that the vendees might recoup their damages arising from the loss of the wood.<sup>2</sup>

ville Mining Co., 64 Mo. App. 564; Wiley v Athol, 150 Mass. 426, 23 N. E. Rep. 311, 6 L. R. A. 342; Reynolds v. Bell, 34 Ala. 496, 4 So. Rep. 703; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Schweickhart v. Stuewe, 71 Wis. 1, 5 Am. St. 190, 36 N. W. Rep. 605; Fabbriotti v. Launitz, 3 Sandf. 743; Vanderbilt v. Eagle Iron Works, 25 Wend. 665; Van Buren v. Digges, 11 How. 461; Polhemus v. Heiman, 45 Cal. 573; Wheelock v. Pacific, Pneumatic Gas Co., 51 Cal. 223; Upton v. Julian, 7 Ohio St. 95; Harris v. Rathbun, 2 Keyes, 312; Hayward v. Leonard, 7 Pick. 181; Allen v. McKibben, 5 Mich. 449; McKinney v. Springer, 3 Ind. 59.

<sup>1</sup>Id. Lomax v. Bailey, 7 Blackf. 599; Hollinsead v. Mactier, 13 Wend. 275; Adams v. Hill, 16 Me. 215; Koon v. Greenman, 7 Wend. 121; Ladue v. Seymour, 24 id. 60; Brewer v. Tyingham, 12 Pick. 547; Coe v. Smith, 4 Ind. 79; Major v. McLester, id. 591; Milnes v. Vanhorn, 8 Blackf. 198; Fenton v. Clark, 11 Vt. 557; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; Seaver v. Morse, 20 Vt. 620; Epperly v. Bailey, 3 Ind. 72; Good-

win v. Morse, 9 Met. 278; Wilkinson v. Ferree, 24 Pa. 190; Higgins v. Lee, 16 Ill. 495; Van Deusen v. Blum, 18 Pick. 229, 29 Am. Dec. 582; Lee v. Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; White v. Oliver, 36 Me. 92; Merrow v. Huntoon, 25 Vt. 9; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Preston v. Finney, 2 W. & S. 53; Ligget v. Smith, 3 Watts, 331, 27 Am. Dec. 358; Danville Bridge Co. v. Pomroy, 15 Pa. 151; Allen v. Robinson, 2 Barb. 341; Rogers v. Humphreys, 39 Me. 382.

<sup>2</sup>Batterman v. Pierce, 3 Hill, 171. This was an early and leading case on the subject of recoupment, and Bronson, J., comprehensively stated the doctrine underlying and governing it. He said: "When the demands of both parties spring out of the same contract or transaction, the defendant may recoup, although the damages on both sides are unliquidated. . . . It was formerly supposed that there could only be a recoupment where some fraud was imputable to the plaintiff in relation to the contract on which the action is founded; but it is now well settled

[284] The plaintiff in one agreement stipulated to deliver forthwith a quantity of dressed pork to the defendant for a certain price, and also to sell him, upon their arrival, at a different price, a number of live hogs then on the way and expected in

that the doctrine is also applicable when the defendant imputes no fraud and only complains that there has been a breach of the contract on the part of the plaintiff. For the purpose of avoiding a circuitry or the multiplication of actions, and doing complete justice to both parties, they are allowed and compelled, if the defendant so elect, to adjust all their claims growing out of the same contract in one action. It was well remarked by Chancellor Walworth, in *Reab v. McAlister*, 8 Wend. 109, that 'there is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered.' The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action; and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part of the plaintiff's demand. He cannot, as in case of set-off, go beyond that, and have a balance certified in his favor. It is no objection to the defense that the plaintiff is not suing upon the original contract of sale, but upon a note given for the purchase-money. The promise of the defendants to pay the purchase-money has undergone the slight modification of being put into the form of a written obligation, and on that the action is founded; but still the plaintiff is in effect seeking to enforce the original contract of sale, and the question must be settled in the same manner as though the action was, in form,

upon that contract. But the objection still remains, and it has been strenuously urged against the defense, that the damages claimed by the defendants do not spring out of the contract of sale, but arise under the collateral agreement of the plaintiff to indemnify against fire. It is undoubtedly true that there can be no recoupment by setting up the breach of an independent contract on the part of the plaintiff. But that is not this case. Here there were mutual stipulations between the parties, all made at the same time, and relating to the same subject-matter; and there can be no difference, in principle, whether the whole transaction is embodied in one written instrument setting forth the cross-obligations of both parties, or whether it takes the form of a separate and distinct undertaking by each party. The plaintiff proposed to sell his wood at auction, and as an inducement to obtain a better price he stipulated with the bidders that they should have two winters and one summer to get away the wood, and that in the meantime he would insure them against the consequence of setting fire to his adjoining fallow grounds. Upon these terms the purchase was made by the defendant. . . . The nature of the transaction cannot be changed by putting the several stipulations of the parties into distinct written contracts; nor can it make any substantial difference that the undertaking of one party has been reduced to writing, while the engagement of the other party remains in parol. In substance it is still the case of mutual stipula-



a few days, no stipulation being made as to the time of [285] payment for either. It was held that the plaintiff was entitled to recover the sum stipulated for the dressed pork, notwithstanding that, after it became due, a breach of the stipulation in respect to the live hogs had accrued, but subject to recoupment of the defendant's damages for such breach.<sup>1</sup>

In an action to recover damages for the conversion of a note made by the plaintiff and also of certain collaterals, the defendant may plead a counter-claim setting up the note and its non-payment at maturity and asking to recover the sum due with interest, although, after the note became due, the plaintiff had tendered to the defendant the sum due on it, and demanded the note with the collaterals, which the defendant refused to surrender. The court agreed that it is not enough that the claims set forth in the complaint and alleged in the counter-claim had a common origin and were coincident in the time of their creation. They must be so related that the counter-claim properly tends to diminish or defeat the plaintiff's recovery. But the case was such. The plaintiff attempted to meet this by saying that upon his tender of the amount due upon the note, the defendant's lien upon the collaterals was discharged and his right to the latter became absolute. This, however, did not solve the question. We must still go back to the transaction set forth in the complaint. What is that transaction? The plaintiff limits it to the technical conversion; that is, to the legal formula of his action. But that is not the entire transaction set forth in the complaint as the foundation of the plaintiff's claim. It is what that transaction comes to when reduced to the concrete charge. But the transaction itself — that is the entire transaction — consists of all the facts averred in the complaint; the making and de-

tions between the same parties, made at the same time and relating to the same subject-matter. The forms which the parties may have adopted for the purpose of manifesting their agreement cannot affect their rights so far as this question is concerned. Whether all the mutual undertakings have been embodied in one written instrument, or in

several, or whether some have been put upon paper while others rest in parol, the reason still remains for allowing the claims of both parties growing out of the same transaction to be adjusted in one action."

<sup>1</sup> Tipton v. Feitner, 20 N. Y. 423; Prairie Farmer Co. v. Taylor, 69 Ill. 440, 18 Am. Dec. 321; Cherry v. Sutton, 30 Ga. 375.

livery of the note; the giving of the collaterals, the tender of the amount due and the refusal thereupon to surrender the securities. The note is a part of the transaction thus set forth. It is interwoven with it. The facts with regard to it are in part the foundation of the plaintiff's claim. If the plaintiff is entitled to the value of his securities, the defendant is equally entitled to the amount of his note. It is entirely just that the plaintiff's claim should be diminished by the amount of the latter debt.<sup>1</sup> On the other hand, the defendant in an action for the value of goods sold and for services rendered cannot recoup damages resulting from an abuse of the writ of attachment issued by the plaintiff, there being no connection between these and the subject of the action.<sup>2</sup> The same is true of a claim for storage asserted in an action brought for the conversion of property stored.<sup>3</sup> Where accounts containing usurious interest have been closed and settled by note, and an action is brought on the note, the defendant cannot counterclaim for double the usury.<sup>4</sup>

These are instances of cross-claims arising from the same contract or transaction. Stipulations are parts of the same contract for the purpose of this defense though they relate to distinct subjects, and a different time of performance, and a distinct and severable compensation is provided for each; so any implied or express warranty or guaranty which forms part of the consideration of the defendant's undertaking, which is the foundation of the plaintiff's action, is part of the same contract; and all damages to which the defendant is entitled thereon may be recouped in such action. Many examples have been given.<sup>5</sup> In England the damages which may

<sup>1</sup> *Empire Dairy Feed Co. v. Chatham Nat. Bank*, 30 App. Div. 476, 52 N. Y. Supp. 387.

<sup>2</sup> *Jones v. Swank*, 54 Minn. 259, 55 N. W. Rep. 1126.

<sup>3</sup> *Schaeffer v. Empire Lithographing Co.*, 28 App. Div. 469, 51 N. Y. Supp. 104. See *Bernheimer v. Hartmayer*, 50 App. Div. 316, 63 N. Y. Supp. 978.

<sup>4</sup> *Witte v. Weinberg*, 37 S. C. 579, 17 S. E. Rep. 681.

<sup>5</sup> In an action upon one of several notes given for a chattel, a breach of warranty being alleged, the defendant may interpose a counter-claim for his entire damage. *Geiser Threshing Machine Co. v. Farmer*, 27 Minn. 428, 8 N. W. Rep. 141; *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. Rep. 149. *Contra*, *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Same v. Jett*, id. 488.

be recouped are limited to those which directly result from the character of the property or the work done; consequential damages must be recovered in a separate action.<sup>1</sup> "But in this country the courts, in order to avoid circuity of action, have gone further and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty or negligence of the plaintiff growing out of or relating to the transaction in question."<sup>2</sup>

**§ 182. Cross-claims between landlord and tenant.** In actions between landlord and tenant they have each the right to recoup damages in the other's action brought on the covenants in the lease, or those which are implied from the relation. Although there be a written lease or even an indenture containing express stipulations and covenants, if others are implied, the latter belong to and are parts of the same contract.<sup>3</sup>

<sup>1</sup> *Mondel v. Steel*, 8 M. & W. 858; *Davis v. Hedges*, L. R. 6 Q. B. 637.

<sup>2</sup> *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. Rep. 696; *Harrington v. Stratton*, 22 Pick. 510; *Withers v. Greene*, 9 How. 215; *Van Buren v. Digges*, 11 id. 661; *Winder v. Caldwell*, 14 id. 434; *Lyon v. Bertram*, 20 id. 149; *Railroad Co. v. Smith*, 21 Wall. 255; *Marsh v. McPherson*, 105 U. S. 709.

<sup>3</sup> *Harmony Co. v. Rauch*, 62 Ill. App. 97; *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Vandegrift v. Abbott*, 75 Ala. 487; *Jones v. Horn*, 51 Ark. 19, 14 Am. St. 17, 9 S. W. Rep. 309; *Gocio v. Day*, 51 Ark. 46; *Lewis v. Chisholm*, 68 Ga. 46; *Stewart v. Lanier House Co.*, 75 Ga. 582, 598; *Howdyshell v. Gary*, 21 Ill. App. 288; *Burroughs v. Clancey*, 53 Ill. 30; *Dodds v. Toner*, 3 Ind. 427; *Blair v. Claxton*, 18 N. Y. 529; *Caldwell v. Pennington*, 3 Gratt. 91; *Vining v. Leeman*, 45 Ill. 248; *Hobein v. Drewell*, 20 Mo. 450; *Lynch v. Baldwin*, 69 Ill. 210; *Whitbeck v. Skinner*, 7 Hill, 53; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Lindley*

*v. Miller*, 67 Ill. 244; *Westlake v. De Graw*, 25 Wend. 669; *Lunn v. Gage*, 37 Ill. 19; *Guthman v. Castleberry*, 49 Ga. 272; *Tone v. Brace*, 8 Paige, 597; *Graves v. Berdan*, 26 N. Y. 498; *Vernam v. Smith*, 15 N. Y. 328; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561; *Eldred v. Leahy*, 31 Wis. 546; *Morgan v. Smith*, 5 Hun, 220; *Commonwealth v. Todd*, 9 Bush, 708; *Holbrook v. Young*, 108 Mass. 83.

If the landlord does not furnish the quantity of land or the number of animals he agrees to, the tenant may recoup his damages in an action brought to recover advances made. *Horton v. Miller*, 84 Ala. 537, 4 So. Rep. 370.

If the tenant makes special inquiry as to the condition of water on the premises he leases, and it is in fact unfit for use, and the landlord, knowing it, fails to remove the cause, the tenant is justified in regarding the condition of the water as an eviction from the premises, and in an action to recover rent may recoup the expenses of sickness, including physician's fees, resulting from the

The landlord, impliedly, in the absence of an express agreement defining his obligation in that regard, undertakes for the quiet enjoyment of the premises by his tenant as against any hostile assertion of a paramount title, and that, so far as [286] he is concerned, he will do no act to interrupt the tenant's free and peaceable possession during the term granted.<sup>1</sup> For any violation or breach of this obligation the tenant may recoup his damages in any action by the landlord against him based on his liabilities as a tenant.<sup>2</sup> But for mere tortious acts of interference by the landlord with the demised premises, not done in the assertion of a right nor amounting to an eviction, damages by way of recoupment have been denied.<sup>3</sup> They have been denied for the malicious prosecution of suits for unlawful detainer because they do not arise out of the contract and are not connected with the subject-matter of the suit.<sup>4</sup> Where a cross-claim exists in favor of the tenant he may avail himself of it not only in an action against him by the landlord on the contract, but also in replevin of property distrained for rent;<sup>5</sup> but not in a summary proceeding for pos-

use of such water. *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. 431, 43 N. W. Rep. 1052.

In a statutory contest between landlord and tenant as to the amount of rent due, the former may meet violation of the lease with violation, damages with damages, have a full reckoning, and uphold his warrant to the extent of the sum due him for rent after a settlement of the damage account. *Johnston v. Patterson*, 91 Ga. 531, 18 S. E. Rep. 350.

<sup>1</sup> *Keating v. Springer*, 146 Ill. 481, 34 N. E. Rep. 805, 37 Am. St. 175, 22 L. R. A. 544; *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Dexter v. Manley*, 4 Cush. 14; *Bradley v. Cartwright*, 36 L. J. (C. P.) 218; *Maule v. Ashmead*, 20 Pa. 482; *Hart v. Smith*, 2 A. K. Marsh. 301; *Young v. Hargrave*, 7 Ohio, 394.

<sup>2</sup> *McAlester v. Landers*, 70 Cal. 79, 11 Pac. Rep. 505; *Kelsey v. Ward*, 38 N. Y. 83; *Mayor v. Mabie*, *supra*;

*Wade v. Halligan*, 16 Ill. 507; *Lynch v. Baldwin*, 69 Ill. 210; *Rogers v. Ostram*, 35 Barb. 523; *Chatterton v. Fox*, 5 Duer, 64.

The fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. *McAlester v. Landers*, *supra*.

<sup>3</sup> *Edgerton v. Page*, 20 N. Y. 281; *Hulme v. Brown*, 3 Heisk. 679; *Bartlett v. Farrington*, 120 Mass. 284; *Campbell v. Shields*, 11 How. Pr. 565; *Drake v. Cockroft*, 10 id. 377; *Walker v. Shoemaker*, 4 Hun, 579; *Lounsbury v. Snyder*, 31 N. Y. 514; *Ogilvie v. Hull*, 5 Hill, 52; *Vatel v. Herner*, 1 Hilt. 149; *Cram v. Dresser*, 2 Sandf. 120; *Crowe v. Kell*, 7 Ind. App. 683, 35 N. E. Rep. 186. But see *Kamerick v. Castleman*, 23 Mo. App. 481.

<sup>4</sup> *Dietrich v. Ely*, 11 C. C. A. 266, 63 Fed. Rep. 413.

<sup>5</sup> *Nichols v. Dusenbury*, 2 N. Y.

session based on the determination of the lease by forfeiture.<sup>1</sup> In an action for rent the defendant may show that the plaintiff agreed to build a fence, or make certain repairs or other improvements, and has neglected to perform the agreement.<sup>2</sup>

**§ 183. Cause of action, connection between and cross-claim.** Where the basis of the transaction between the [287] parties is a contract and its breach amounts to a trespass or entitles the injured party to an action for negligence or fraud, or to any action *ex delicto*, he is not deprived of his right to set off such a claim, nor the other party to set off a claim arising upon the contract against such a cause of action. In all such cases, there being a contract in fact, the party in default is not allowed to deprive the injured party of the right to take advantage of such default by way of recoupment or counter-claim by alleging that the contract was tortiously violated.<sup>3</sup>

283; Fowler v. Payne, 49 Miss. 32; Breese v. McCann, 52 Vt. 498; Fairman v. Fluck, 5 Watts, 516; Guthman v. Castleberry, 49 Ga. 272; Phillips v. Monges, 4 Whart. 225; Hatfield v. Fullerton, 34 Ill. 278; Lindley v. Miller, 67 Ill. 244.

Where the board of supervisors allowed a claim for repairing a bridge, and issued a warrant therefor, and afterwards the claimant committed a breach of his contract by failing to keep it in repair pursuant to his bond, and he and his sureties became insolvent, held, that the board, in an action of *mandamus* to compel payment of the warrant, could recoup the breach, occurring before notice of assignment, against the assignee of the warrant. Jefferson County v. Arrghi, 51 Miss. 668.

<sup>1</sup>McSloy v. Ryan, 27 Mich. 110; D'Armond v. Pullen, 13 La. Ann. 137; Johnson v. Hoffman, 53 Mo. 504.

<sup>2</sup>Miller v. Gaither, 3 Bush, 152; Myers v. Burns, 35 N. Y. 269; Hexter v. Knox, 63 N. Y. 561; Guthman v. Castleberry, 49 Ga. 272; Fairman v. Fluck, 5 Watts, 516; Lunn v. Gage, 37 Ill. 19; Kimball v. Doggett, 62 Ill.

App. 528; Baker v. Fawcett, 69 id. 300.

The tenant may rely upon his landlord to repair according to his agreement, and is not barred of the right to recoup because he might have made the repairs at small cost. Culver v. Hill, 68 Ala. 66, 44 Am. Rep. 134.

<sup>3</sup>Davidson v. Wheeler, 17 R. I. 433, 22 Atl. Rep. 1022; Cole v. Colburn, 61 N. H. 499; Morrison v. Lovejoy, 6 Minn. 319; Hatchett v. Gibson, 13 Ala. 587; Williams v. Schmidt, 54 Ill. 205; Chamboret v. Cagney, 2 Sweeny, 378, 41 How. Pr. 125; Starbird v. Barons, 43 N. Y. 200; Wadley v. Davis, 63 Barb. 500; Griffin v. Moore, 52 Ind. 295; McArthur v. Green Bay, etc. Co., 34 Wis. 139; Bitting v. Thaxton, 72 N. C. 541; Price v. Lewis, 17 Pa. St. 51, 55 Am. Dec. 536; Scott v. Kenton, 81 Ill. 96. See Scheunert v. Kaehler, 23 Wis. 523.

In all cases in which the parties have entered into an express contract and in which a tort has been suffered, which the sufferer may waive and sue in *assumpsit*, a counter-claim may be made under the

Where there was an exchange of chattels the court said: Here are mutual and adverse claims for damages growing out of one transaction. Each party sold to the other a chattel and took another chattel in payment. For misrepresentations of the

contract. *Barnes v. McMullins*, 78 Mo. 260. And where the actor elects to sue in tort for a wrong originating in or growing out of a contract which he pleads as an inducement, the defendant may counter-claim for damage sustained by the breach of the contract. *Kamerick v. Castleman*, 23 Mo. App. 481.

The rule in Pennsylvania is that, independently of statute, any matter either of contract or of tort, immediately connected with the plaintiff's cause of action, may be set up by way of defense to the action and in abatement of the plaintiff's damages only; any matter of contract may be set up by way of counter-claim under the statute, not only to defeat the action but for the purpose of establishing a liability of the plaintiff to the defendant in excess of the latter's demand. No mere matter of tort can be availed of by the defendant under the statute. *Dushane v. Benedict*, 120 U. S. 630, 644, 7 Sup. Ct. Rep. 696, citing many Pennsylvania cases.

In *Conner v. Winton*, 7 Ind. 523, the court defined a counter-claim to be that which might have arisen out of, or could have had some connection with, the original transaction in the view of the parties, and which at the time the contract was made they could have intended might in some event give one a claim against the other for compliance or non-compliance with its provisions.

In *Slayback v. Jones*, 9 Ind. 472, the court, referring to recoupment and counter-claim, said: "They relate more especially to damages for breach of contract which may be recouped in a suit for what may have

been done or rendered in part performance of a contract. In such cases the cause of action and defense are part of the same transaction."

In *Lovejoy v. Robinson*, 8 Ind. 399; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496, the court say that trespasses cannot be made to compensate each other.

In Minnesota independent torts cannot be counter-claimed. *Allen v. Coates*, 29 Minn. 46, 11 N. W. Rep. 132.

In *Barlyte v. Hughes*, 33 Barb. 320, and *Loewenberg v. Rosenthal*, 18 Ore. 178, 22 Pac. Rep. 601, the word "transaction" was construed to refer to business dealings, and did not include torts. *Macdougall v. McGuire*, 35 Cal. 274, 95 Am. Dec. 98.

A counter-claim founded on contract cannot be interposed in an action based on fraud. *People v. Denison*, 84 N. Y. 272; *Davis v. Frederick*, 6 Mont. 300; *Humbert v. Brisbane*, 25 S. C. 506; *Copeland v. Young*, 21 id. 275.

Where there is no contract relation between the parties touching the subject in question, mutual torts committed at the same time or in such succession or sequence as would make them parts of the *res gestæ* cannot be made the basis of recoupment or counter-claim. In an action for assault and battery the defendant cannot counter-claim or recoup for a battery committed at the same affray by the plaintiff on the defendant (*Schnaderbeck v. Worth*, 8 Abb. Pr. 37); nor can the defendant in an action for slander counter-claim for slanderous words uttered by the plaintiff. *Kemp v. Amacker*, 13 La. 65.

character alleged each party may generally sue in contract or tort. If the plaintiff had declared in contract, alleging that the defendant agreed that his horse was sound as far as he knew, knowing him to be unsound, it cannot be doubted that

In *Askins v. Hearn*, 3 Abb. Pr. 184, Justice Emott thought a counter-claim could not be sustained upon the following facts: The plaintiff sued for damages for conversion of a ring. The defendant alleged an exchange of rings, each to be kept until the other should be returned, and averred a tender of the one and demand of the other, and asked judgment for his ring. Such a counter-claim would now be allowed without hesitation. Hoffman, J., said of this case, that "a distinction may be suggested, that where the ground of each claim is really a contract, although the form of action under the old system would be for a wrong, then, when the transaction that gives rise to each is the same, the code is broad enough to include a counter-claim. The exchange alleged of the rings was in fact a mutual agreement." *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 377. In this case Woodruff, J., said: "The great question in controversy is, in an action in the nature of trover by a plaintiff who has indorsed notes or bills of exchange, brought to recover the value thereof from a defendant in whose possession they are, and who claims title thereto through the plaintiff's indorsement, can the defendant set up title in himself, demand of payment, protest and notice, and ask by way of counter-claim a judgment against the plaintiff as indorser?" It was decided in the affirmative. After quoting subdivisions 1 and 2 of section 150 of the New York code, the judge said: "This division of the section shows that there may be a counter-claim when the *action*

*itself does not arise* on contract; for the second clause is expressly confined to actions upon contract and allows counter-claims in such cases of any other cause of action also arising on contract; and this may embrace probably all cases heretofore denominated 'set-off,' legal or equitable, and any other legal or equitable demand, liquidated or unliquidated, whether within the proper definition of set-off or not if it arise on contract. *Gleason v. Moen*, 2 Duer, 639. The first subdivision would therefore be unmeaning as a separate definition if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counter-claims which did not themselves arise on contract. The first subdivision by its terms assumes that the plaintiff's complaint may set forth, as the foundation of the action, a contract or a transaction. The legislature in using both words must be assumed to have designed that each should have a meaning; and in our judgment this construction should be according to the natural and ordinary signification of the terms. In this sense every contract may be said to be a transaction, but every transaction is not a contract. Again, the second subdivision having provided for all counter-claims arising on contract — in all actions arising on contract — no cases can be supposed to which the first subdivision can be applied unless it be one of three classes, viz: 1st. In actions in which a contract is stated as the plaintiff's claim — counter-claims which arise

the defendant may recoup his damages. The fact that the defendant sues in tort does not complicate the matter. It is not more difficult, or less desirable, in such an action to have the whole litigation adjusted in a single suit.<sup>1</sup>

out of the same contract; or, 2d. In actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which arise out of the same transaction; or, 3d. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which neither arise out of the same contract, nor out of the same transaction, but which are connected with the subject of the action."

In *Glen & Hall M. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278, an action was brought to restrain the defendant from using the plaintiff's trade-mark; the defendant claimed it was his, and asked damages for plaintiff's use of it by way of counter-claim, and it was held to be proper.

A claim on the part of the defendant for the price and value of the identical goods which are the subject of the action is a cause of action arising out of the same transaction alleged as the foundation of the plaintiff's claim, or is at least connected with the subject of the action. *Thompson v. Kessel*, 30 N. Y. 383; *Brown v. Buckingham*, 11 Abb. Pr. 387.

The words "subject of the action" refer to the origin and ground of the plaintiff's right to recover rather than to the thing itself in controversy. *Collier v. Erwin*, 3 Mont. 142.

In an action for assault and battery the injury which provoked the defendant to commit the wrong is not connected with the subject of

the action. *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. Rep. 624.

The debauchery of the defendant's daughter is not ground for a counter-claim in an action brought by him guilty thereof to recover money obtained by duress. *Heckman v. Swartz*, 55 Wis. 173, 12 N. W. Rep. 439.

In an action against a judgment creditor for the unlawful seizure of exempt property the defendant cannot set up the judgment under which the seizure was made as a counter-claim. *Elder v. Frevert*, 18 Nev. 446, 3 Pac. Rep. 237.

The "subject of the action" is the facts constituting the plaintiff's cause of action. The mere fact that the defendant sets up acts on the part of the plaintiff which are prejudicial to his rights, and alleges that these acts on his part give the reason the defendant conducted himself as complained of by the plaintiff, does not show such a connection as is necessary to constitute such acts a counter-claim. *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. Rep. 745. The word "connected" may have a narrow or broad signification, according to the facts of the case.

"The counter-claim must have such relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and the counter-claim should be settled in one action by one litigation; and that the claim of the one should be offset against or applied upon the

<sup>1</sup> *Carey v. Guillow*, 105 Mass. 18, 7 Am. Rep. 494.



If the buyer of goods brings an action against the seller for not completing the contract the latter may counter-[288, 289] claim or recoup for the goods already delivered.<sup>1</sup> And so in an action by the vendor to recover the price of goods sold and only delivered in part the purchaser may recoup any damages sustained by him by reason of the failure or refusal to deliver the residue;<sup>2</sup> and in replevin for goods sold with reservation of title until payment, for failure to deliver at the time fixed;<sup>3</sup> and generally for failure to deliver as agreed although the contract is severable and part delivery has been accepted;<sup>4</sup> and in an action by the seller for the price the buyer may recoup for any deficiency in quantity, delay in delivery or breach of warranty.<sup>5</sup> So in an action on a note given for the good will of a business the defendant may recoup his damages resulting from the plaintiff's resumption of that business;<sup>6</sup> and

claim of the other." This rule includes a case where a second mortgagee in possession of land committed waste for the alleged purpose of depriving the defendant, the first mortgagee, of his security. In an action for the conversion of wood cut by the second mortgagee the damage sustained by the prior incumbrancer was connected with the subject of the action. *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552. See *Thomson v. Sanders*, 118 id. 252, 23 N. E. Rep. 374.

In an equitable action to cancel an insurance policy a counter-claim alleging a cause of action on the policy for the loss of property insured is connected with the subject of the action. *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa, 508, 8 N. W. Rep. 388, 9 id. 386.

The penalty imposed upon a national bank for taking an unlawful rate of interest cannot be counter-claimed in an action upon the instrument discounted by it. *Barnet v. Nat. Bank*, 98 U. S. 555. See, generally, *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. Rep. 14; *Evans v. Hughey*,

76 Ill. 115; *Nolle v. Thompson*, 3 Met. (Ky.) 121; *Kingman v. Draper*, 14 Ill. App. 577; *Cow Run Co. v. Lehmer*, 41 Ohio St. 384; *Tarwater v. Hannibal, etc. R. Co.*, 42 Mo. 193; *McArthur v. Green Bay, etc. Co.*, 34 Wis. 139; *Walsh v. Hall*, 66 N. C. 233; *Walker v. Johnson*, 28 Minn. 147, 9 N. W. Rep. 632; *Poston v. Rose*, 87 N. C. 279; *Whitlock v. Ledford*, 82 Ky. 390; *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. Rep. 550.

<sup>1</sup> *Leavenworth v. Packer*, 52 Barb. 132.

<sup>2</sup> *Harrolson v. Stein*, 50 Ala. 347; *Platt v. Brand*, 26 Mich. 173; *Bowker v. Hoyt*, 18 Pick. 555.

<sup>3</sup> *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. Rep. 1063.

<sup>4</sup> *Gomer v. McPhee*, 2 Colo. App. 287, 31 Pac. Rep. 119; *Booth v. Tyson*, 15 Vt. 515; *Evans v. Chicago, etc. R. Co.*, 26 Ill. 189.

<sup>5</sup> *Cooke v. Preble*, 80 Ill. 318; *Hitchcock v. Hunt*, 28 Conn. 343; *Stiegleman v. Jeffries*, 1 S. & R. 477, 7 Am. Dec. 626.

<sup>6</sup> *Warfield v. Booth*, 33 Md. 63; *Herbert v. Ford*, 29 Me. 546; *Burkhardt v. Burkhardt*, 36 Ohio St. 261.

in an action on an agreement not to set up business in a certain place the defendant may recoup the amount agreed to be paid for the good will.<sup>1</sup> A contract which gives the sole right to sell an article in a specified place is not so disconnected with a note executed at the same time for the purchase-money of the article to be sold as that the damages resulting from the breach of the former cannot be recouped in a suit on the latter.<sup>2</sup>

§ 184. **Recoupment between vendor and purchaser.** On the same principles recoupment is reciprocally available between vendor and purchaser of real estate as well as of personal property. Recoupment may be had against the vendor for false representations affecting the identity and value of the land.<sup>3</sup> The purchaser's right to do so is not affected by the fact that the sale included both personal and real property, and that the misrepresentation related to only one class, if the transaction and the consideration were an entirety.<sup>4</sup> If tenants in common make partition to each other by quitclaim deeds the law implies a warranty that each will make good to the other any loss resulting from a superior title;<sup>5</sup> hence a counterclaim may be maintained by the tenant who is evicted, on that account, against his co-tenant.<sup>6</sup> In debt on a bond given for real estate or other action for the price the defendant may recoup his damages for the plaintiff's breach of an agreement to give possession, as well as for injury to the premises,<sup>7</sup> or for the violation of an agreement to dig a well on the premises sold.<sup>8</sup> So a vendee's action to recover the purchase-money is subject to recoupment for his negligent destruction of the subject of the purchase.<sup>9</sup> Recoupment has been allowed, in a suit for

<sup>1</sup> *Baker v. Connell*, 1 Daly, 469.

<sup>2</sup> *Andre v. Morrow*, 65 Miss. 315, 7 Am. St. 658, 3 So. Rep. 659.

<sup>3</sup> *James v. Elliot*, 44 Ga. 237; *Estell v. Myers*, 56 Miss. 800; *Warvelle on Vendors* (2d ed.), § 962; *Mulvey v. King*, 39 Ohio St. 491.

<sup>4</sup> *Baughman v. Gould*, 45 Mich. 481, 8 N. W. Rep. 73.

<sup>5</sup> *Nixon v. Lindsay*, 2 Jones' Eq. 230; *Rogers v. Turley*, 4 Bibb, 355; *Morris v. Harris*, 9 Gill, 26.

<sup>6</sup> *Huntley v. Cline*, 93 N. C. 458.

<sup>7</sup> *Patterson v. Hulings*, 10 Pa. 506; *Owens v. Rector*, 44 Mo. 389; *Gordon v. Bruner*, 49 Mo. 570; *Grand Lodge v. Knox*, 20 Mo. 433; *Streeter v. Streeter*, 43 Ill. 155; *Fetternecht v. McKay*, 47 N. Y. 426; *Abrahamson v. Lamberson*, 72 Minn. 308, 75 N. W. Rep. 226.

<sup>8</sup> *Maguire v. Howard*, 40 Pa. 391.

<sup>9</sup> *Hatchett v. Gibson*, 13 Ala. 587.

purchase-money, for damages done to the premises by an [290] adverse claimant, pending a litigation with the vendor, in which the latter's title was maintained; because, as plaintiff, he could have indemnified himself against the spoliator by the recovery of *mesne* profits.<sup>1</sup>

It is well settled that when a deed has been made and accepted, and possession taken under it, defects in the title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants for title, except in some states on the covenant of seizin, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect.<sup>2</sup> Though if no title or possession passed by the deed it would seem that any undertaking for payment of the purchase-money would be void for want of consideration notwithstanding the covenants in the deed.<sup>3</sup>

A vendee is authorized to extinguish an incumbrance or to remedy a defect of title after a breach of the covenant of warranty, without a special request from or the consent of the vendor, and may recoup the amount reasonably paid for that purpose in an action for purchase-money, where there are covenants for title and against incumbrances.<sup>4</sup> So the vendee may

<sup>1</sup> Weakland v. Hoffman, 50 Pa. 513, 88 Am. Dec. 560.

<sup>2</sup> Whisler v. Hicks, 5 Blackf. 100, 33 Am. Dec. 454; Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; Stanard v. Eldridge, 16 Johns. 254; Stephens v. Evans, 30 Ind. 39; Brandt v. Foster, 5 Iowa, 287; McCaslin v. State, 44 Ind. 151; Edwards v. Bodine, 26 Wend. 109; Abbott v. Allen, 2 Johns. Ch. 519; Bumpus v. Platner, 1 id. 213; Farnham v. Hotchkiss, 2 Keyes, 9; Warvelle on Vendors (2d ed.), § 862. But see Walker v. Wilson, 13 Wis. 522; Hall v. Gale, 14 Wis. 54; Akerly v. Vilas, 21 Wis. 88; Lowry v. Hurd, 7 Minn. 356; Scantlin v. Allison, 12 Kan. 85; Tarpley v. Poage, 2 Tex. 139.

<sup>3</sup> Dickinson v. Hall, 14 Pick. 217; Rice v. Goddard, id. 293; Trask v. Vinson, 20 id. 105; Key v. Henson,

17 Ark. 254; Tillotson v. Grapes, 4 N. H. 444.

<sup>4</sup> Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; Stanard v. Eldridge, 16 Johns. 254; Johnson v. Collins, 116 Mass. 393; Leffingwell v. Elliott, 10 Pick. 204; Brooks v. Moody, 20 Pick. 474; Norton v. Babcock, 2 Met. 510; Doremus v. Bond, 8 Blackf. 368; Baker v. Railsback, 4 Ind. 533; Brandt v. Foster, 5 Iowa, 287; McDaniel v. Grace, 15 Ark. 465; Lamerison v. Marvin, 8 Barb. 11; Detroit & M. R. Co. v. Griggs, 12 Mich. 45; Stillwell v. Chappell, 30 Ind. 72; Brown v. Crowley, 39 Ga. 376, 99 Am. Dec. 462; Deen v. Herrold, 37 Pa. 150; Key v. Henson, 17 Ark. 254; Brown v. Starke, 3 Dana, 316; Burk v. Clements, 16 Ind. 132; Schuchmann v. Knoebel, 27 Ill. 175; Christy v. Ogle, 33 Ill. 295; Kent v. Cantrall, 44 Ind.

[291] recoup his damages on the covenant of warranty after the title has failed and there has been an eviction, or what is equal thereto.<sup>1</sup> In some states, however, the defense for partial failure of title to real estate is not allowed at law in actions for the price.<sup>2</sup> Generally no difference is made as to the exercise of the right of recoupment whether the plaintiff's action is brought on the original contract, or on a note or other security given for the price, and the latter under seal.<sup>3</sup> Such a distinction, however, seems to be recognized in New Jersey<sup>4</sup> and in England. In an action on a bill of exchange for goods supplied, which were "to be of good quality and moderate price," and to be estimated at about 400%, bills having been given for that amount, it was no defense that the goods turned out to be worth much less than the estimated price. Lord Tenterden said: "The cases cited by the plaintiffs have completely established the distinction between an action for the price of the goods and an action on the security given for them. In the former, only the value can be recovered; in the latter, I take it to have been settled by these cases, and acted upon ever since as law, that a party holding bills given for [292] the price of goods supplied can recover upon them unless there has been a total failure of consideration. If the consid-

452; *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674; *Davis v. Bean*, 114 Mass. 358; *Scantlin v. Allison*, 12 Kan. 85; *McKee v. Bain*, 11 Kan. 569.

<sup>1</sup> *McDaniel v. Grace*, 15 Ark. 487; *Tallmadge v. Wallis*, 25 Wend. 107; *Sargeant v. Kellogg*, 10 Ill. 273; *Wilson v. Burgess*, 34 id. 494; *Coster v. Monroe Manuf. Co.*, 2 N. J. Eq. 467; *Tone v. Wilson*, 81 Ill. 529; *McDowell v. Milroy*, 69 id. 498.

<sup>2</sup> *Cullum v. Bank of Mobile*, 4 Ala. 21, 37 Am. Dec. 725; *Starke v. Hill*, 6 Ala. 785; *Tankersly v. Graham*, 8 id. 247; *Helvenstein v. Higgason*, 35 Ala. 259; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490; *Wheat v. Dotson*, 12 Ark. 699; *Bowley v. Holway*, 124 Mass. 395.

<sup>3</sup> *Harrington v. Stratton*, 22 Pick. 510; *Van Epps v. Harrison*, 5 Hill,

63; *Judd v. Dennison*, 10 Wend. 512; *Payne v. Cutler*, 13 Wend. 605; *Goodwin v. Morse*, 9 Met. 278; *Purkett v. Gregory*, 3 Ill. 44; *Christy v. Ogle*, 33 Ill. 295; *Hitchcock v. Hunt*, 28 Conn. 343; *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Kellogg v. Denslow*, 14 Conn. 411; *Wilmot v. Hurd*, 11 Wend. 585; *Dailey v. Green*, 15 Pa. 118; *Ward v. Reynolds*, 32 Ala. 384; *Key v. Henson*, 17 Ark. 254.

In an action by the vendee upon the covenants in his deed the vendor may recoup the unpaid purchase-money or notes given to represent the same. *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. Rep. 401, 3 Am. St. 57.

<sup>4</sup> *Price v. Reynolds*, 39 N. J. L. 171; *Hunter v. Reiley*, 43 id. 480.

eration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by cross-action. The warranty relied on in this action makes no difference."<sup>1</sup>

In Wisconsin it has been held that where notes are given for the contract price they are not payment unless so agreed; and in a suit upon one of several such notes it will be presumed, in the absence of evidence, that those not yet due are still in the vendor's hands, and that it is error to render judgment for the defendant on a counter-claim for the excess of his damages for breach of warranty over the note in suit.<sup>2</sup> It was held to be unjust to allow the defendants full damages for breach of warranty, the same as though they had paid for the property, when these damages largely exceed the amount sued for. In Minnesota the decisions are to the contrary and rest upon the principle that the defendant's cause of action is one and indivisible; that a recovery of a part of the damages would bar a subsequent counter-claim to recover for the remainder.<sup>3</sup>

**§ 185. Liquidated and unliquidated damages may be recouped.** It is immaterial whether the damages which a defendant seeks to recoup or counter-claim are liquidated or unliquidated; nor is it material whether the plaintiff's demand is liquidated or not.<sup>4</sup> The theory of this defense being the setting off of the damages on one cause of action against those recoverable on another to avoid the necessity of other suits,

<sup>1</sup> Obbard v. Betham, Moo. & M. 483; Morgan v. Richardson, 1 Camp. 40, n.; Day v. Nix, 9 Moore, 159; Trickey v. Larne, 6 M. & W. 278; Gascoyne v. Smith, McC. & Y. 338; Warwich v. Nairn, 10 Ex. 762.

<sup>2</sup> Aultman & T. Co. v. Hetherington, 42 Wis. 622; Aultman & T. Co. v. Jett, id. 488.

<sup>3</sup> Geiser Threshing Machine Co. v. Farmer, 27 Minn. 428, 8 N. W. Rep. 141; Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373, 13 N. W. Rep. 149.

<sup>4</sup> North German Lloyd Steamship Co. v. Wood, 18 Pa. Super. Ct. 488;

Lierz v. Morris, 19 id. 73; Weaver v. Penny, 17 Ill. App. 628; Batterman v. Pierce, 3 Hill, 171; Ward v. Fellers, 3 Mich. 281; Winder v. Caldwell, 14 How. 484; Van Buren v. Digges, 11 id. 461; McLure v. Rush, 9 Dana, 64; Bayne v. Fox, 18 La. 80; Stoddard v. Treadwell, 26 Cal. 294; Keyes v. Western Vermont Slate Co., 34 Vt. 81; Hubbard v. Fisher, 25 Vt. 539; Dennis v. Belt, 30 Cal. 247; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Schubert v. Harteau, 34 Barb. 447; Speers v. Sterrett, 29 Pa. 192; Hayne v. Prothro, 10 Rich. 218.

where both arise out of the same transaction, the defendant puts forward a substantive cause of action, becomes an actor to assert and prove it, with no other hampering conditions than would apply to him as plaintiff in a separate action upon his claim. When it appears to be so connected with the subject of the plaintiff's action as to be available as a counter-[293] claim or by way of recoupment, it must be pleaded and proved according to the same rules as when it is made the basis of an action; the damages, if of such nature as to be submitted to the consideration of a jury in a suit brought for their recovery, are equally subject to determination by a jury for the purpose of redress in favor of a defendant. The policy of admitting this defense to avoid circuity of action obviously embraces all cases where the rights of the parties are of such a character as to be susceptible of adjustment in one action. Accordingly, where the defense has the necessary connection with the subject of the plaintiff's action and the rights of both parties may be finally and justly settled by one adjudication, it is not essential that the damages on either side should be liquidated, nor of the same nature;— they may be liquidated on one side and unliquidated on the other; on one side they may be claimed strictly for violation of contract, and on the other for fraud,<sup>1</sup> or negligence,<sup>2</sup> or other tort,<sup>3</sup> or for tort on both sides.<sup>4</sup>

**§ 186. Affirmative relief not obtainable.** Recoupment is generally available only as a defense; for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess.<sup>5</sup> It is not necessary that it be a full defense;<sup>6</sup> it cuts off so much of the plaintiff's damages as the cross-claim comes to,<sup>7</sup> and when sufficient in amount may, of course, satisfy his claim entirely.<sup>8</sup> The verdict will then be

<sup>1</sup> See § 179.

<sup>2</sup> § 180.

<sup>3</sup> § 180.

<sup>4</sup> *Carey v. Guillow*, 105 Mass. 18; *Estell v. Myers*, 54 Miss. 174; *Deagan v. Weeks*, 67 App. Div. 410, 73 N. Y. Supp. 641; *Pelton v. Powell*, 96 Wis. 473, 71 N. W. Rep. 887. *Contra*, *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

<sup>5</sup> *Hay v. Short*, 49 Mo. 139; *Ward v. Fellers*, 3 Mich. 281; *Estell v. Myers*, 54 Miss. 174; *Fowler v. Payne*, 52 Miss. 210. *Contra*, *Johnson v. White Mountain Creamery Ass'n*, 68 N. H. 437, 36 Atl. Rep. 13, 73 Am. St. 610.

<sup>6</sup> *Ross v. Longmuir*, 15 Abb. Pr. 326.

<sup>7</sup> *Ives v. Van Epps*, 22 Wend. 155.

<sup>8</sup> *Deagan v. Weeks*, 67 App. Div. 410, 73 N. Y. Supp. 641.

for the defendant. In this respect it is different from mere mitigation, for damages can never be mitigated below a nominal sum. But however large the damages assessable in respect of the defendant's cross-claim set up by way of recoupment, if it exceed the plaintiff's damages only so much is taken into account as is required to annul his demand; the excess is lost.<sup>1</sup> This limitation has been obviated by the defendant bringing a cross-suit as well as setting up the claim by way of re- [294] coupment and having the actions consolidated or tried together.<sup>2</sup> If two cross-actions are so tried, one for the price of property sold and the other for fraud in the vendor, the jury, if they find the fraud and that the damages equaled or exceeded the purchase-money, may render a verdict for the defendant in the first action and for the plaintiff in the second for the excess, if any, of such damages.<sup>3</sup> But in such case a party who defends by recoupment and brings a cross-suit, on the trial of both together is not entitled to have damages assessed in both actions for the same breach of contract, nor to divide his claim for damages as he sees fit between the two. Both actions being tried together, however, his entire damages for breaches of the contract, or in respect of his cross-demand, must be assessed and applied first, to cancel in whole or in part the damages of the plaintiff in the first action; then, if there be an excess, it should be returned in a verdict for the plaintiff in the cross-action.<sup>4</sup> Very generally in this country authority has been given to render judgment in favor of the defendant for any excess of damages after satisfying the demand against which his cross-claim is preferred. But when the plaintiff sues as assignee of the demand, the defendant having a cross-claim against the assignor can only use it for defense; to that extent it is available the same as though the suit were in the name of the assignor.<sup>5</sup>

<sup>1</sup> Brunson v. Martin, 17 Ark. 270; Burlingame v. Davis, 13 Ill. App. 602; Kingman v. Draper, 14 id. 577; Waterman v. Clark, 76 Ill. 428; Stow v. Yarwood, 14 id. 424; Charles City Plow & Manuf. Co. v. Jones, 71 Iowa, 234, 32 N. W. Rep. 280.

<sup>2</sup> Cook v. Castner, 9 Cush. 266; Star Glass Co. v. Morey, 108 Mass. 570.

<sup>3</sup> Cook v. Castner, *supra*.

<sup>4</sup> Star Glass Co. v. Morey, *supra*.

<sup>5</sup> See § 176; Desha's Ex'r v. Robinson, 17 Ark. 228.

§ 187. **Election of defendant to file cross-claim or sue upon his demand.** A defendant has an election to use such cross-demand as a defense by way of recoupment or to bring a separate action upon it; but he will not have an election to set up his claim by way of recoupment unless it would be just and equitable, and it is practicable to adjust and allow it in the plaintiff's action. The omission to take advantage of matter of recoupment or counter-claim as a defense is no bar to a [295] cross or separate action upon it; so that, though the cross-claim be admissible by way of defense, the defendant has an option to avail himself of it in that form or to sue upon it in another action.<sup>1</sup> The reason for allowing the defendant an option is that it would greatly diminish the benefit to which he is entitled and in some cases wholly neutralize it, because, while the right of action exists, the extent to which the breach of warranty or of contract may afford a defense is usually uncertain, it may require some time for the development of all the injury which will result from the plaintiff's misconduct or default. It is unreasonable, therefore, that he should have the right to fix the time at which the money value of his wrongdoing or negligent omission shall be ascertained.<sup>2</sup>

But the defendant will be denied the right of recoupment when it cannot be justly and equitably allowed.<sup>3</sup> It is a defense on principles borrowed from equity, and if a superior equity intervene it will be denied; and when any equitable barrier exists and the whole controversy cannot be settled in the plaintiff's action a separate suit must be brought. On this ground, in several states, defenses of this kind in suits for the purchase-money of land based on breaches of covenants for title will not be allowed in actions at law.<sup>4</sup> The owner of a lot entered into a contract with others for the latter to build

<sup>1</sup> *Barth v. Burt*, 43 Barb. 628; *Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. Rep. 717.

<sup>2</sup> *Davis v. Hedges*, L. R. 6 Q. B. 687.

<sup>3</sup> Judgment may be ordered for the plaintiff on the pleadings if the answer states a counter-claim for merely nominal damages and the costs will not be affected by doing

so. *Hitchcock v. Turnbull*, 44 Minn. 475, 47 N. W. Rep. 153.

Where notes are given on a settlement for a balance found due after all the grounds for claiming a recoupment are known to their maker he is estopped from urging any such matters in defense to an action upon them. *Hill v. Parsons*, 110 Ill. 107.

<sup>4</sup> See § 184.



a warehouse upon it for a specified sum. The contract also contained a lease to this party for thirteen years from the date fixed for its completion at a stated yearly rent. After the building had been erected the builders and lessees entered a mechanic's lien for the work and materials, and two years afterwards the property was sold, and it had to be determined how the fund should be distributed. The lessees had occupied for two years without paying any rent, and during that time the lessor became indebted to them on account to an amount nearly equal to the rent for that period. The court below excluded the lessee's account as a set-off against the rent, and set off the rent against the lien debt because these latter were part of one transaction. This decision was the subject of review. Thompson, J., said: "There are undoubtedly cases in which the transaction is so entirely a unit that it is most just and proper when litigation arises that matters arising directly out of it should be determined in one suit. These cases are not parallel with this. Here the same paper, it is true, contains the contract out of which the lien arises as well as that out of which the rent accrued; but they are as distinct and separate covenants as if written on separate sheets of paper. There is a complete contract for building, describing the kind, of structure, and the time when to be completed and paid for. Then follows a complete lease of the building for a long term, to commence shortly before its completion and to con- [296] tinue for thirteen years. The former, the building contract, was to be finished in about eight months, and to be then paid for. The first year's rent would not fall due for near a year after. These things show the distinctiveness of the covenants as contracts. Now the lien might have been reduced under the principle invoked by showing defectiveness in the work and the like, and so might the rent if the landlord had been suing for it on account of interference with the tenant's possession, not amounting to eviction, but acts against quiet enjoyment. These would be instances of claims arising in the same transaction being allowed to be given in evidence to extinguish the claim by a liberal construction of our defalcation act. . . . It was impossible to settle the entire covenants in one action. They were of different and distinct natures, and to be performed at different and distinct periods. In ap-

plying the rent, therefore, to the extinguishment of the lien, on this principle alone, when the plaintiffs had other claims entitled to its application on equitable principles, was of course error in the absence of appropriation by the debtor and creditor. They, therefore, should have been allowed to put in evidence their book account; if it was unpaid and unsecured, and no appropriation by the parties of the rent, equity would apply it to the book account in preference to the old debt secured by the lien. This is the well settled rule."<sup>1</sup>

In an action on a note against the executor of an accommodation indorser, it appeared that the note was made, indorsed and transferred to the plaintiff in payment of, or as collateral security for, an antecedent debt of a firm of which the maker was a member; that afterwards the firm made an assignment to the plaintiff for the benefit of the creditors, preferring the plaintiff and the defendant's testator. The answer setting up these facts alleged also that the assets were more than sufficient to pay in full all the preferred creditors. But as these facts could not be established without an accounting, and the plaintiff was entitled, when compelled to account, to do so entirely, which could not occur in that action for the want of necessary parties, all evidence touching the counterclaim was properly rejected.<sup>2</sup>

**§ 188. Burden of proof; measure of damages.** When a defendant sets up a cross-claim by way of recoupment he assumes, like a plaintiff, the burden of proof in respect to it; and the same rule or measure of damages applies as would be applicable in a separate suit upon such claim; subject, however, to the limitation already mentioned, that there can be no recovery by a defendant for any balance found in his favor beyond the damages established on the part of the plaintiff, in the absence of a statute authorizing it. The burden of proof rests upon him because he asserts a claim or right, and must therefore produce the proof necessary to make good his contention.<sup>3</sup> That the same rule of damages applies has been

<sup>1</sup> *McQuaide v. Stewart*, 48 Pa. 198.  
See *Howe Machine Co. v. Hickox*,  
106 Ill. 461.

<sup>2</sup> *Bailey v. Bergen*, 67 N. Y. 346.  
See *Duncan v. Stanton*, 30 Barb. 533.

<sup>3</sup> *Mendel v. Fink*, 8 Ill. App. 378; 1  
Whart. Ev., § 356.

The defendant has the burden of  
establishing all the elements of a  
cause of action (*Heedstrom v. Baker*,

repeatedly held;<sup>1</sup> and it is universally assumed by actually applying it.<sup>2</sup> But the rule is the rule of compensatory damages — no recovery on a claim set up for recoupment can be had for malice or any aggravation in the form of exemplary damages.<sup>3</sup> The consideration that this defense is to avoid circuitry of action, and when resorted to is a substitute, [298] renders it desirable and necessary to its usefulness that the defendant, to the extent of full defense, should have the benefit of the rule of damages to which he would be entitled if he elected to bring a separate action.

**§ 189. A cross-claim used in defense cannot be sued upon.**

When a cross-claim is submitted as a defense by way of re-

13 Ill. App. 104); and must plead them. *Rawson v. Pratt*, 91 Ind. 9.

<sup>1</sup> *Goodwin v. Morse*, 9 Met. 278; *Myers v. Estell*, 47 Miss. 4; *Hitchcock v. Hunt*, 28 Conn. 343; *Timmons v. Dunn*, 4 Ohio St. 680.

<sup>2</sup> *Blanchard v. Ely*, 21 Wend. 342; *Tinsley v. Tinsley*, 15 B. Mon. 454; *Rogers v. Ostram*, 35 Barb. 523; *Stoddard v. Treadwell*, 26 Cal. 294; *Satchwell v. Williams*, 40 Conn. 371; *Cook v. Soule*, 56 N. Y. 420; *Warfield v. Booth*, 33 Md. 63; *Bradley v. Rea*, 14 Allen, 20; *Harralson v. Stein*, 50 Ala. 347; *Haven v. Waketield*, 39 Ill. 509; *Dounce v. Dow*, 57 N. Y. 16; *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Van Epps v. Harrison*, 5 Hill, 63; *Overton v. Phelan*, 2 Head, 445; *Timmons v. Dunn*, 4 Ohio St. 680; *Rotan v. Nichols*, 22 Ark. 244; *Harris v. Rathbun*, 2 Keyes, 312; *Railroad Co. v. Smith*, 21 Wall. 255.

<sup>3</sup> *Allaire Works v. Guion*, 10 Barb. 55. This case has sometimes been cited as holding that special damages are not the subject of recoupment (*Benkard v. Babcock*, 2 Robert. 175); and *Dorwin v. Potter*, 5 Denio, 306, has also been cited as holding the same. Neither case advances any such doctrine. In the latter case a landlord's action for rent was defended by way of recoupment for his neglect to put the barns on the

demised premises in that state of repair required by his agreement. The court say, *Whittlesey, J.*: "The material question here is as to the proper rule of damages for such neglect to repair. We do not know what the referees adopted, but the questions put to the witnesses after objection would only be admissible upon the ground that the defendant was entitled to all the damages which he might have sustained by the injuries to the cows and young cattle, the increase of food required, and the decrease of produce by reason of the state of the barns in question. It strikes me that such damages are altogether too remote and contingent, and that the true rule of damages is the sum necessary to place the barns in that state of repair in which they were to be put according to the agreement, with interest thereon, if the referees thought proper to allow interest." There is no hint that this rule was adopted because the plaintiff's breach of contract was set up by way of recoupment; but it is laid down as "the proper rule of damages for such neglect to repair;" on that subject see *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

recoupment the judgment will be a bar to another action or recoupment. A defendant has an election to avail himself of a cross-claim by way of recoupment, or under the code as a counter-claim, or to bring an action upon it. This choice, however, is only final when submitted for adjudication, and is so to prevent a second recovery. Neither pleading it in defense nor bringing an action upon it will determine the election.<sup>1</sup> Where it appeared in a suit in which a cross-claim was set up by way of recoupment that the defendants had previously brought an action for the same damages, which was still pending, and the trial court had rejected the defense, the appellate court said: "The court [below] seemed to have regarded the pendency of the other action as a sort of abatement of the defendants' plea, or to have deemed the bringing of the suit (by the defendants) . . . as a conclusive election to prosecute a cross-action, and not to recoup or use the claim as a defense under any circumstances while that action should continue. There is in this holding a misapprehension of the defendants' position. They are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages they find themselves prosecuted by their adversary. They may defend by setting up any matter which [299] the law recognizes as a defense, whether it be a cause of action, or whether it be a judgment actually recovered therein — the only difference being that after judgment it must be used as a judgment and by way of set-off. The election made by the defendants was not an election not to recoup. At that time it was an election between prosecuting to establish their claim, or suffering the injury without seeking any redress. And when the plaintiff forced them into court, . . . their opportunity to use their claim by way of defense first arose, and they had a right to embrace it. Until judgment in one of the suits, the right to press the claim in the other continued."<sup>2</sup> But after a judgment in a separate action upon the

<sup>1</sup> McDonald v. Christie, 42 Barb. 36; Fabbricotti v. Launitz, 3 Sandf. 743; Rankin v. Barnes, 5 Bush, 20; Gilmore v. Reed, 76 Pa. 462. See Cook v. Castner, 9 Cush. 266; Miller v. Freeborn, 4 Robert. 608.

<sup>2</sup> Naylor v. Schenck, 3 E. D. Smith, 135; Lindsay v. Stewart, 72 Cal. 540, 14 Pac. Rep. 516.

If the matter pleaded in recoupment can be set up in defense to a suit upon the contract out of which

claim it is merged in the judgment; or, if rejected, barred; if the issue embraces it, the judgment is conclusive.<sup>1</sup>

In an action for breach of warranty in the sale of personal property these facts appeared: A note given for the

it arose and which is pending it will not be proper to plead it in another suit in the same court. *Jefferson Lumber Co. v. Williams*, 68 Tex. 656, 5 S. W. Rep. 67.

A plaintiff is not estopped from prosecuting a suit for work and labor by reason of the payment of a judgment recovered against him by the defendant pending such suit for damages for the improper performance of the work and labor sued for; the claim is not *res judicata* because one suit sounded in tort and the other in *assumpsit*. *Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. Rep. 717.

<sup>1</sup>*Davis v. Tallcot*, 12 N. Y. 184; *Kane v. Fisher*, 2 Watts, 246; *Grant v. Button*, 14 Johns. 377; *O'Connor v. Varney*, 10 Gray, 231; *Burnett v. Smith*, 4 Gray, 50; *Salem India R. Co. v. Adams*, 23 Pick. 256; *Stevens v. Miller*, 13 Gray, 283; *Huff v. Broyles*, 26 Gratt. 283; *Beall v. Pearre*, 12 Md. 550; *McLane v. Miller*, 10 Ala. 856; *Britton v. Turner*, 6 N. H. 481, 495, 26 Am. Dec. 713.

In *Davis v. Tallcot*, *supra*, it was held that a recovery in a suit upon an agreement, wherein the right to recover depended by the pleadings upon the truth of the allegations made in the complaint and denied by the answer, that the plaintiff had fully performed the agreement, is a bar to an action brought subsequently by the defendant in the first suit against the plaintiff therein to recover damages for the alleged non-performance of the same agreement. The record of the recovery estops the defendant from controverting that the plaintiff therein

fully performed the contract. The rule is not otherwise, although in the first suit the defendant, in addition to the allegation of performance, alleged breaches by the plaintiff, and claimed to recoup damages, and at the trial expressly withdrew the claim for damages, gave no evidence touching the alleged breaches, and the second suit was to recover damages for such breaches.

Gardiner, C. J., said: "The defendants in that (the former) action, the present plaintiffs, insisted upon the non-performance of the agreement upon the part of Tallcot and Canfield, the manufacturers of the machinery, for two purposes entirely distinct in their nature and objects. First, as a complete defense to the action, by a denial of that which the makers of the machinery had averred and must prove before they could recover anything. Second, as a foundation for a claim in the nature of a cross action for damages to be deducted from the amount which the then plaintiff might otherwise recover. It is obvious that, by withdrawing their claim to damages, the then defendants did not waive the right to insist upon their defense. The plaintiffs, notwithstanding, must have established their title to the price stipulated, by proof that the machinery was made within the time and in the manner called for by the agreement; and the vendees were at liberty to meet and combat these proofs by counter evidence on their part. Now, this was precisely what was done, or rather the necessity for introducing evidence to sustain the action was superseded by

purchase-money had been collected by suit; to that the now plaintiff had pleaded *non assumpsit*, and it was agreed that under that plea he might offer the special matter in evidence as fully as if he had specially pleaded the same or given notice thereof; the breach of warranty now sued for the then defendant offered to prove as a defense, but it was rejected by the court because it did not tend to show a total failure of consideration. On these facts the judgment in the former action

the admission of the then defendants in open court 'that they were indebted to the manufacturers for the causes of action mentioned in their complaint.' As the cause of action and the indebtedness of the defendants were by the complaint made dependent upon a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect; and the report of the referee followed by the judgment of the court consequently estops the parties to that suit from ever after questioning that fact in any controversy upon the same agreement (2 Cow. & H. N. 843; 10 Wend. 80, 3 Comst. 173). In the suit now pending, however, the vendees bring their suit upon the same contract against the manufacturers, and aver a non-performance by the defendants as the sole cause of action. They have succeeded in the court below, notwithstanding the objection we have considered; and there are, consequently, two records in the same court between the same parties, each importing absolute verity, one of which affirms that the manufacturers faithfully performed said agreement 'in every respect on or before the 7th of June, 1850; the other, that they did not perform it in any respect at any time.' This flat contradiction is attempted to be reconciled by the assertion that the

record in the first suit only shows that this point might have been, not that it was, litigated. The answer is that the record in that case proves that that question of performance was directly in issue and must have been litigated; that a recovery without establishing the fact of performance was a legal impossibility. Again, the parol evidence, if admissible, only proves that the vendees did not rely upon a breach of the contract upon the part of the makers of the machinery to support their claim to recoup. This is the course they would naturally adopt if their damages, in their opinion, exceeded the sum to be paid for the machinery. Their only remedy for the excess would depend upon defeating the action then pending, and subsequently suing on the agreement. That this was really the object of their legal adviser is evidenced by the fact that while the manufacturers recovered in their suit less than \$650, the present plaintiffs have obtained judgment in the case under review for upwards of \$900. The withdrawal of their claim to recoup was therefore not only consistent with the determination to insist upon a breach of the contract on the part of the manufacturers in order to defeat the suit then pending, but this was indispensable to the ultimate recovery of their full damages in a subsequent action.' See *Merriam v. Woodcock*, 104 Mass. 326.

[301] was held to be a bar.<sup>1</sup> The defense being admissible in the former action and erroneously rejected, the judgment had the same effect as though the claim had been admitted. The error of its rejection should have been corrected by proceedings taken in that case; therefore the exclusion of the defense by the court had the same effect as a disallowance by a jury.<sup>2</sup> Where, notwithstanding the cross-claim is pleaded, the judgment is afterwards taken by default by the plaintiff, and so appears by the record, such claim is not barred.<sup>3</sup> The fact that the judgment was upon default makes it as certain that the counter-claim was not passed upon by an actual adjudication as though the plea had been formally withdrawn. If several notes have been given for a chattel and they become due at different times, and the defendant in an action upon the one which matures first counter-claims for damages arising from the breach of the warranty, judgment in his favor estops him from pleading such defense in an action subsequently brought upon the other notes.<sup>4</sup>

§ 190. **Notice of cross-claim.** This defense being a substitute for an action and to avoid the necessity of another suit, some pleading must be adopted by which the defendant evinces his election to insist on his cross-claim as a defense. It must make the necessary allegations and inform the plaintiff so that he may not be taken by surprise. And it must be set up in the answer under the code.<sup>5</sup> The defendant is as much concluded by the amount of damages he claims in his counter-claim as the plaintiff is by his complaint.<sup>6</sup> Recoupment can-

<sup>1</sup> Beall v. Pearre, 12 Md. 550.

<sup>2</sup> Grant v. Button, 14 Johns. 377; Smith v. Whiting, 11 Mass. 445.

<sup>3</sup> Bascom v. Manning, 52 N. H. 132; Bodurtha v. Phelon, 13 Gray, 413.

<sup>4</sup> Geiser Threshing Machine Co. v. Farmer, 27 Minn. 428, 8 N. W. Rep. 141; Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373, 13 N. W. Rep. 149. Compare Aultman & T. Co. v. Hetherington, 42 Wis. 622; Aultman & T. Co. v. Jett, id. 488.

<sup>5</sup> Trowbridge v. Mayor, 7 Hill, 429; Burton v. Stewart, 3 Wend. 236; Barber v. Rose, 5 Hill, 76; Crane v.

Hardman, 4 E. D. Smith, 448; Lamson & Goodnow M. Co. v. Russell, 112 Mass. 387; Lansing v. Van Alstyne, 2 Wend. 561; Steamboat Wellsville v. Geisse, 3 Ohio St. 333; Young v. Plumeau, Harp. 543; Maverick v. Gibbs, 3 McCord, 315; McLure v. Hart, 19 Ark. 119; Hill v. Austin, id. 230; Spink v. Mueller, 77 Mo. App. 85; Rawson v. Pratt, 91 Ind. 9.

<sup>6</sup> Annis v. Upton, 66 Barb. 370; Taylor v. Butters & Peters Salt & Lumber Co., 103 Mich. 1, 61 N. W. Rep. 5.

not extend beyond the specific matters sued upon unless the notice or pleading informs the plaintiff that the defendant will go into others.<sup>1</sup> The notice must be sufficiently certain to apprise the plaintiff of the nature of the defendant's claim, and in case of a suit upon contract it must specify the breach complained of.<sup>2</sup> An averment in a cross-bill claiming a recoupment of special damages for the breach of a contract, the general damages for which appear to be only nominal, should be special; if it only alleges that the defendant has been damnified to a specified amount it is insufficient.<sup>3</sup> A reduction of damages by way of recoupment cannot be shown under a special plea in bar, but may be obtained under the general issue.<sup>4</sup> Statutes concerning notice will be liberally construed; the rules in relation to a variance between the pleadings and the proof will not be applied to the notice, which is good if it states the ground and substance of the defense, though it is defective in matters of form.<sup>5</sup> The only way to make the objection that a cause of action pleaded as a counter-claim is not such in the particular case because it is in no way connected with the subject of plaintiff's action is by demurrer. If there is no demurrer on that ground and issue is taken on the facts alleged, the right to object is waived.<sup>6</sup>

## SECTION 5.

### MARSHALING AND DISTRIBUTION.

**§ 191. Definition.** Marshaling is the setting of debts [302] or assets in a certain order; distribution is the application of funds to the payment of debts marshaled. There are therefore two kinds of marshaling, one of assets, the other of debts. Marshaling is resorted to whenever it becomes necessary practically to answer either the question in what order certain distinct funds or properties shall bear the burden of paying or contributing to pay a debt which is directly or indi-

<sup>1</sup> *McKevitte v. Feige*, 57 Mich. 374, 24 N. W. Rep. 109.

<sup>2</sup> *Sinker v. Diggins*, 76 Mich. 557, 43 N. W. Rep. 674.

<sup>3</sup> *Hooper v. Armstrong*, 69 Ala. 343.

<sup>4</sup> *Wadhams v. Swan*, 109 Ill. 46; *Hoerner v. Giles*, 53 Ill. App. 540;

*McCormick Harvesting Machine Co. v. Robinson*, 60 id. 253.

<sup>5</sup> *Merrill v. Everett*, 38 Conn. 40.

<sup>6</sup> *Ayres v. O'Farrell*, 10 Bosw. 143;

*Hammond v. Terry*, 3 Lans. 186; *Walker v. Johnson*, 28 Minn. 147, 9 N. W. Rep. 632.



rectly a charge upon all; or, secondly, when there are several debts directly or indirectly charged upon one fund or property which is insufficient to pay them in full, to determine in what order such fund shall be applied as far as it will go. In answering the first, the court settles the order of liability among the funds that must pay; the second, the priorities of the claims to be paid. Under the first inquiry two classes of persons are liable to be affected: those having proprietary interests in the fund or property marshaled, and creditors having liens thereon.

**§ 192. Sales of incumbered property in parcels to different purchasers.** For the protection of purchasers this rule obtains: if the creditor's lien be upon several parcels of land for the payment of the same debt, and some of those parcels belong to the person who in equity and justice owes, or ought to pay, the debt, and other parcels have been transferred by him to third persons, his part, as between himself and them, shall be primarily chargeable with the debt.<sup>1</sup> And if [303] there have been successive alienations by him of parts of the incumbered property, and the portion retained is insufficient to discharge the entire incumbrance, the parcels transferred will be subject to sale in the inverse order of alienation.<sup>2</sup> The

<sup>1</sup> 2 Story's Eq., § 1233; Clowes v. Dickenson, 5 Johns. Ch. 235, 9 Cow. 403; Cowden's Estate, 1 Pa. 267, 274; Mason v. Payne, Walk. Ch. 459; Cooper v. Bigly, 13 Mich. 463; Barnes' Appeal, 46 Pa. 350; Ammerman v. Jennings, 12 B. Mon. 135.

In Clowes v. Dickenson, 9 Cow. 403, it was held that if the creditor or any other person having control of his judgment cause a sale of the aliened part before resorting to that retained by the judgment debtor, the latter part being sufficient to pay his debt, though no order or decree be obtained directing the remaining portion to be first sold, such creditor will be required to restore the real estate so sold; or, if sold to a *bona fide* purchaser, to account to the alienee for the value of the real estate so sold, if the other part would

have satisfied the judgment; or, if not, to restore or account for the value beyond what would, with the other, have satisfied the judgment. That such alienee, having stood by and allowed the legal estate to pass from him, shall not be allowed the land itself, with improvements made subsequent to the execution sale and before he asserted his claim. The true value of the aliened estate in market at the time of the execution sale, not the price bid for it, is the measure of compensation.

<sup>2</sup> Id.; Wieting v. Bellinger, 50 Hun, 324, 3 N. Y. Supp. 361; Gage v. McGregor, 61 N. H. 47; Vogle v. Brown, 120 Ill. 338, 11 N. E. Rep. 327, 12 id. 252; Gill v. Lyon, 1 Johns. Ch. 447; Stevens v. Cooper, id. 425; James v. Hubbard, 1 Paige, 228; Gouverneur v. Lynch, 2 id. 300; Guion v. Knapp,

operation of this rule may be waived, limited or modified by the instrument executed to the earlier grantee, which will bind all who claim under him.<sup>1</sup>

[304] § 193. **Sale subject to incumbrance.** If a portion of the land covered by a mortgage is conveyed subject to the payment of the entire mortgage by the grantee the subsequent purchaser of another parcel,<sup>2</sup> or the mortgagor,<sup>3</sup> has a right to insist that the parcel so conveyed shall be first sold to satisfy the mortgage. The lot so sold becomes, as to the parties to the conveyance, the primary fund for the payment of the mortgage,<sup>4</sup> and the grantee thereby becomes the party who in justice ought to pay the debt. The mortgagor becomes then a *quasi*-surety, and has the right to insist upon the collection of the debt first out of the land.<sup>5</sup>

6 id. 35; Skeel v. Spraker, 8 id. 182; Patty v. Pease, id. 277, 35 Am. Dec. 683; Schryver v. Teller, 9 Paige, 173; New York Life, etc. Co. v. Cutler, 3 Sandf. Ch. 176; Commercial Bank v. Western Reserve Bank, 11 Ohio, 444, 38 Am. Dec. 739; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Stuyvesant v. Hall, 2 Barb. Ch. 151; Averall v. Wade, Lloyd & Gould, 252; Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151; Hurd v. Eaton, 28 Ill. 122; Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136; Root v. Collins, 34 Vt. 173; Brown v. Simons, 44 N. H. 475; Jenkins v. Freyer, 4 Paige, 53; Howard Ins. Co. v. Halsey, 4 Sandf. 565; La Farge Ins. Co. v. Bell, 22 Barb. 54; Gates v. Adams, 24 Vt. 71; Chase v. Woodbury, 6 Cush. 143; Black v. Morse, 7 N. J. Eq. 509; Shannon v. Marselis, 1 id. 412; Henkle v. Allstadt, 4 Gratt. 284; Jones v. Myrick, 8 Gratt. 179; Britton v. Updike, 3 N. J. Eq. 125; Wikoff v. Davis, 4 id. 224.

Judge Story (2 Story's Eq., § 1233b) doubts whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate

estates mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other. On the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates. And so the doctrine has been asserted in the ancient as well as modern English cases on the subject (Harbert's Case, 3 Co. 12; Barnes v. Racster, 1 Y. & C. New Cas. 401; Lanoy v. Duchess of Athol, 2 Atk. 448; Aldrich v. Cooper, 8 Ves. 391; Averall v. Wade, Lloyd & Gould, 252; Bugden v. Bignold, 2 Y. & C. New Cas. 377; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458); and the law is so settled in Kentucky. Dickey v. Thompson, 8 B. Mon. 312; Morrison v. Beckwith, 4 T. B. Mon. 76; Hughes v. Graves, 1 Litt. 319; Burk v. Chrisman, 3 B. Mon. 50.

<sup>1</sup> Vogel v. Shurtliff, 28 Ill. App. 516; Briscoe v. Powers, 47 Ill. 447.

<sup>2</sup> Caruthers v. Hall, 10 Mich. 40.

<sup>3</sup> Mason v. Payne, Walker's Ch. 461.

<sup>4</sup> Cox v. Wheeler, 7 Paige, 248; Jumel v. Jumel, id. 591.

<sup>5</sup> Harris v. Jex, 66 Barb. 232.

The rule being intended for the benefit of parties having separate interests in the property or fund on which the debt is a lien, their relation between themselves is considered in determining whether the burden rests upon them equally, or if unequally, in what order their several properties may be resorted to for payment. Where there are several heirs, or where several persons join in a recognizance, one heir, or one consor, should not be charged exclusively, for their relations and duties are equal.<sup>1</sup> And the same principle would apply between several purchasers of the same date. But the property of the party who is in equity bound to pay the debt, as between him and the owner of other property bound for the same debt, is the primary fund; and the court will establish the order, between any number of persons whose property is subject to the debt, in which resort may be had to properties so separated in ownership. Thus, in an action of foreclosure against G. and L. as mortgagors, where it appears that G. is possessed of a portion of the premises in his own right, and L. of another portion, and that a third portion is held jointly, and it also appears that L. personally owes the mortgage debt, or is equitably bound to pay it, the judgment should be so entered that the interest of L. be first sold; secondly, the joint interest; and lastly, the interest of G.<sup>2</sup>

But these equities between co-debtors, by which one [305] part of incumbered premises becomes the primary fund for the payment of the mortgage, may be defeated by the *bona fide* purchase of that part by one without notice of the facts which raise these equities. Where A. and B., owning lands in severalty, joined in mortgaging them to secure the payment of a joint debt, and A. afterwards executed a bond of indemnity to B. agreeing to pay the whole mortgage debt, but subsequently executed on his lands other mortgages for a valuable consideration, to parties who had no notice of the bond or agreement between him and B., it was held on the foreclosure of the mortgage that B. could not, as against the subsequent mortgagees, compel the collection of the whole of the original

<sup>1</sup>Harvey v. Woodhouse, Select Cas. in Ch. 80. See Clowes v. Dickenson, 5 Johns. Ch. 235, 241.

<sup>2</sup>Ogden v. Glidden, 9 Wis. 46; Warren v. Boynton, 5 Barb. 13; Cornell v. Prescott, id. 16.

mortgage debt from the land of A. to their prejudice, and that half of it was collectible from B.'s land.<sup>1</sup>

§ 194. **Effect of creditor releasing part.** A creditor, having notice of such equities between several parties owning property subject to his debt, cannot defeat them by releasing the property first liable. A release by the mortgagee of a portion of the land mortgaged, with knowledge of a prior sale of another portion, will operate as to such prior purchaser as a discharge *pro tanto* of the mortgage debt.<sup>2</sup> But a release without such knowledge will not be a discharge.<sup>3</sup>

§ 195. **Rights where one creditor may resort to two funds and another to only one.** A rule for the protection of creditors having junior liens exists. If one creditor can resort to two funds and another to but one of those funds, the former will be compelled to seek satisfaction out of the fund which the other cannot reach, if adequate,<sup>4</sup> and it can be done [306] without prejudice to such double fund creditor.<sup>5</sup> The rule is founded in social duty and is never enforced to the prejudice of such creditor;<sup>6</sup> nor where it will work injustice

<sup>1</sup> Hoyt v. Dougherty, 4 Sandf. 462; Root v. Collins, 34 Vt. 173.

<sup>2</sup> Brown v. Simons, 44 N. H. 475; Guion v. Knapp, 6 Paige, 43; Patty v. Pease, 8 id. 277; La Farge Ins. Co. v. Bell, 22 Barb. 54; Taylor v. Maris, 5 Rawle, 51. See Cooper v. Bigly, 13 Mich. 463; James v. Brown, 11 Mich. 25; Howard Ins. Co. v. Halsey, 4 Sandf. 565; Union Nat. Bank v. Moline, etc. Co., 7 N. D. 201, 73 N. W. Rep. 527.

<sup>3</sup> Id.

<sup>4</sup> Ball v. Setzer, 33 W. Va. 444, 10 S. E. Rep. 798; Hall v. Stevenson, 19 Ore. 153, 23 Pac. Rep. 887; Glass v. Pullen, 6 Bush, 346; Wise v. Shepherd, 13 Ill. 41; Marshall v. Moore, 36 Ill. 321; Hurd v. Eaton, 28 Ill. 122; Evertson v. Booth, 19 Johns. 492; Hayes v. Ward, 4 Johns. Ch. 132; Dodds v. Snyder, 44 Ill. 53; Goss v. Lester, 1 Wis. 43; Worth v. Hill, 14 Wis. 559; Ogden v. Glidden, 9 Wis. 46; Lloyd v. Galbraith, 32 Pa. 103;

Nailer v. Stanley, 10 S. & R. 450; Cowden's Estate, 1 Pa. 267; Bank of Kentucky v. Vance's Adm'r, 5 Litt. 168. See Union Nat. Bank v. Moline, etc. Co., 7 N. D. 201, 73 N. W. Rep. 527.

<sup>5</sup> Logan v. Anderson, 18 B. Mon. 114; Jervis v. Smith, 7 Abb. Pr. (N. S.) 217; Wise v. Shepherd, 13 Ill. 41; Cannon v. Hudson, 5 Del. Ch. 112; Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. 22, 5 S. E. Rep. 600; Leib v. Stribling, 51 Md. 285; Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; McArthur v. Martin, 23 Minn. 75; Gilman v. McCormack, 85 Tenn. 597, 4 S. W. Rep. 521.

<sup>6</sup> Id. In Worth v. Hill, 14 Wis. 559, the mortgage being foreclosed covered two distinct tracts in different towns. The defendant Buck, who was the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not

to other parties. Thus where a firm creditor has security [307] on the separate property of one of its members, such creditor is not for that reason to be excluded from sharing in the proceeds of the company assets until he has exhausted his security,

covered by this, in the same town. Defendant Mowry held a mortgage next to Buck's in point of time, but upon the land in the other town covered by the mortgage, and also upon another tract. Hence the Mowry mortgage did not cover any of the land mortgaged to Buck, but their interests conflicted by reason of the mortgage which was being foreclosed, and which was prior to both, covering a part of the land contained in each of them. It further appeared that there was a mortgage prior to all of these, covering the tract in the Buck mortgage, and the parcel in the Mowry mortgage which was not contained in the mortgage being foreclosed; that that mortgage had been foreclosed, and that part which was covered by the Mowry mortgage adjudged to be sold before the part covered by Buck's. It was further proved that the other tract covered by Buck's mortgage was ample security for the amount of the debt secured by that mortgage. Upon this state of facts it had been decreed below that the portion covered by Buck's mortgage should be sold in this foreclosure before that covered by Mowry's, and from that part of the decree Buck appealed.

Referring to the equitable rule that in foreclosure cases where the land has been subsequently conveyed by the mortgagor it shall be sold in the inverse order of alienation, Paine, J., says: "The justice of this rule has been sometimes questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same

time we think it may be controlled by other established equitable principles, where the facts render them applicable; and such we think was the case here. It is a familiar principle that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as Mowry sets up these facts to rebut the equity Buck would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived Mowry of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first for Buck's benefit, now if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony that upon the decree as rendered Mowry is protected and Buck left with ample security for his debt. Suppose A. mortgages a tract to B., then gives a second mortgage on a part of it to C., which mortgage also covers other tracts, and then gives a mortgage on another part to D. On a foreclosure of B.'s mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D.'s part first. But suppose D. could show that the other tracts covered by C.'s mortgage were an ample security for his debt; would not that raise an equity sufficient to overcome the ordinary rule, and require as between C. and D. that C.'s part should be first sold? I think so;

for that would be a detriment to such creditor where it involved delay, and unjust to the creditors of the separate estate which furnished the security.<sup>1</sup> Where the rule would [308] be applied in favor of a creditor having a right to resort to but one fund or property, it will be equally available to one claiming through a sale under his lien.<sup>2</sup>

**§ 196. Same when the funds belong to two debtors.** The rule, however, does not apply when one of the creditors has a lien for his debt upon two funds belonging to two separate debtors, and the other has a lien upon a fund belonging to one of them, so as to compel the first creditor to make his claim wholly out of that debtor whom the other cannot reach, un-

and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other cannot reach is not applicable to such a case. It is true that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that might still be in a position to resort to the other to supply any deficiency; and here B. may not be left in such a position. I think that is good reason why such a decree as the one made in this case should be made only upon clear proof of the entire adequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule was adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be necessary for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testi-

mony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception."

In *Miller v. Jacobs*, 3 Watts, 477, it was held that one lien creditor can invoke no security taken by another which had not become a lien when he procured his own; hence, a subsequent mortgagee, having taken bonds but without a warrant to confess judgment, has no equity to call on a prior mortgagee to enter up a judgment on a bond which accompanied his mortgage in order to throw him on another fund; nor can the subsequent mortgagee object to the vacation of judgments subsequently confessed on those bonds, though purposely withdrawn to make way for other judgment creditors whose lien funds are consequently posterior in date to his lien on the mortgaged premises.

<sup>1</sup> *Bell v. Hepworth*, 51 Hun, 616, 4 N. Y. Supp. 823; *Morrison v. Kurtz*, 15 Ill. 193. See *Berry v. Powell*, 18 Ill. 98; *White v. Dougherty*, Mart. & Yerg. 309, 17 Am. Dec. 802; *Breedlove v. Stump*, 3 Yerg. 257.

<sup>2</sup> *Marshall v. Moore*, 36 Ill. 321. See *Dodds v. Synder*, 44 Ill. 53; *McCormick's Appeal*, 55 Pa. 252.

less there be some peculiar relations between these debtors which would make it equitable that the debtor having but one creditor should pay the whole demand against him and his co-debtor.<sup>1</sup> A creditor who has a double security, or a right to go upon more than one fund for payment, may go on all or either one of them for his whole debt. His interest under each is several and independent of the other, and cannot be diminished by reference to the value of the other.<sup>2</sup> A creditor who has several securities, neither one of which is sufficient for the payment of his debt, has a right to look to each one of them for its payment in the same manner and to the same extent that he could do if he had no other. It is only when it may happen that a creditor who has no more securities than one may not require for the payment of his debt the entire proceeds of all his securities that any marshaling of them can take place for the benefit of other creditors who are only subsequently entitled to a lien on a part of the same fund or property.<sup>3</sup> If, for example, property sufficient for the payment of fifty cents on the dollar be mortgaged to two or more creditors, and the mortgagor afterwards mortgages other property to the same and other creditors to secure the payment of the same debts, and also the debts due to the other creditors, and the fund arising from the last mortgage is [309] also sufficient to pay fifty cents on the dollar of all the debts therein named, the creditors in the first mortgage have a right to their full proportion thereof on the whole amount of their debts without regard to what has been or may be received by them on the first mortgage. The two securities are sufficient for the payment of those creditors who are entitled to the benefit of both; and yet, if the other creditors in the second mortgage have a right to reduce their debts by applying as a credit thereon the amount of their dividend under the first mortgage, and to restrict them to a *pro rata* of the proceeds of the last mortgage on the balance of their debt, when thus reduced, one-fourth part of it would still remain unpaid, al-

<sup>1</sup> *Wise v. Shepherd*, 13 Ill. 41; *Dorr v. Shaw*, 4 Johns. Ch. 17, 20; 1 Story's Eq., § 642; *Ebenhardt's Appeal*, 8 W. & S. 327. See *Ex parte Kendall*, 17 Ves. 520.

<sup>2</sup> *Gwynne v. Edwards*, 2 Russ. 289. See *Kendall v. New England Carpet Co.*, 13 Conn. 383.

<sup>3</sup> *Logan v. Anderson*, 18 B. Mon. 114.

though either security taken separately was sufficient for the payment of one-half of the debt.<sup>1</sup> Whenever, then, a mortgage or assignment is executed to secure the payment of certain specified debts and it contains nothing to show that it was intended only to secure the payment of a part of the debt of some of the creditors, and not the whole amount thereof, the mortgagees or beneficiaries under the assignment have each a right to a full ratable share of the fund on the whole amount of their respective debts. This share cannot be diminished by the existence of another security, where both securities are necessary for the payment of the debt. Equity refuses to interfere or to marshal the securities to the prejudice of the creditor entitled to a double fund. And it makes no difference in such a case whether the benefit of one of the funds has been realized or still remains as a mere security for the payment of the debt.<sup>2</sup>

**[310] § 197. Principle on which priority determined.**

The principle is believed to be universal that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject which it binds unless the lien be intrinsically

<sup>1</sup> Logan v. Anderson, *supra*.

<sup>2</sup> *Id.*; Morris v. Olwine, 22 Pa. 441; Kittera's Estate, 17 id. 416; Miller's Appeal, 35 id. 481; Jervis v. Smith, 7 Abb. Pr. (N. S.) 217; Graeff's Appeal, 79 Pa. 146; Patten's Appeal, 45 Pa. 152, 84 Am. Dec. 479; Hess' Estate, 69 Pa. 272; Brough's Estate, 71 Pa. 460.

In Patten's Appeal, *supra*, it was held that the detention by vendors of goods sold, on the insolvency and assignment for the benefit of creditors by the vendees, does not rescind the contract of sale; and the vendors are entitled to a *pro rata* distribution out of the assigned estate; and that where a part of the goods had been delivered and the balance which had been detained was sold by the vendors, who applied the proceeds to the payment of the notes given upon the sale, leaving a balance still due, they were entitled to a dividend upon the whole amount of their claim at

the date of the assignment. See Midgeley v. Slocomb, 2 Abb. Pr. (N. S.) 275.

In Bridendecker v. Lowell, 32 Barb. 9, it was held that where an arrangement was made between debtor and creditor, by which the former gives a new security upon property exceeding in value the amount of the debt, and receives back the evidence of his indebtedness, there being at the time a general fund or security by mortgage upon real estate embracing all the debts of the debtor, but insufficient to pay the whole, the effect of such an arrangement was to make the specified security the primary fund for the payment of the debt specifically secured by it, and to postpone the right of that creditor to participate in the general fund until the specific fund had been exhausted.



defective or be displaced by some act of the party holding it which should postpone him in a court of law or equity to a subsequent claimant.<sup>1</sup> Where surplus moneys arose upon the foreclosure of several mortgages and were thus claimed: by judgment creditors having the first lien upon two such funds; by a mortgage creditor having a later lien on only one such fund, and by other judgment creditors having still later liens upon all, the prior judgment was ordered paid out of the fund not subject to the mortgage, but if it were not sufficient, any deficiency was to be paid prior to the mortgage out of the fund on which the mortgage was a lien; then the mortgage was to be paid out of the surplus on which it was a lien, and the subsequent creditors were entitled to payment only after satisfaction in this manner of the prior judgment and mortgage creditors.<sup>2</sup>

## SECTION 6.

## SET-OFF OF JUDGMENTS.

§ 198. Power to direct set-off inherent. Courts of [311] law or equity have power to order mutual judgments to be set off against each other on motion made for that purpose.

<sup>1</sup> Rankin v. Scott, 12 Wheat. 177; Broom's Max. 236; 9 Paige, 61, note; Weaver v. Toogood, 1 Barb. 238; Embree v. Hanna, 5 Johns. 101, 9 Am. Dec. 274; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633; Watson v. Le Row, 6 Barb. 481; Lynch v. Utica Ins. Co., 18 Wend. 236; Poillon v. Martin, 1 Sandf. Ch. 569; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603.

It is held in Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. Rep. 521, that marshaling is a pure equity and does not rest at all upon contract. The equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but is to be determined at the time the marshaling is invoked. The equity does not become a fixed right until the proper steps are taken to have it enforced; until then it is subject to displace-

ment and defeat by subsequently acquired liens upon the funds. The facts were that the owner of three lots gave six mortgages thereon to different persons at various dates; the first mortgage covered the entire property, and the subsequent ones parcels thereof less than the whole. All the lots were sold, and their proceeds were insufficient to pay all the mortgage debts. A controversy arose among the junior mortgagees as to the application of the proceeds of the sale after the senior mortgages were discharged. It was held that the several mortgages should be paid *pro rata* in the order of their priority out of the amount realized from the parcel or parcels covered by each.

<sup>2</sup> New York L. Ins. & F. Co. v. Vanderbilt, 12 Abb. Pr. 458.

Such power is not derived from or exercised in pursuance of the statutes which allow parties to set off mutual debts. It follows the general jurisdiction of a court over its suitors: it is an equitable part of such jurisdiction and has been frequently exercised.<sup>1</sup> Courts proceed upon the equity of the statute of set-offs; but as their power consists in the authority they have over their suitors, rather than any express or delegated authority, their action in such cases has been termed the exertion of the law of the court. Suitors may ask their interference in effecting such set-off, not *ex debito justitiæ*, but only *ex gratia curiæ*.<sup>2</sup>

§ 199. When it will or will not be granted. One judgment will not be ordered to be set off against another, on motion, unless it is a judgment which is conclusive on the party against whom it is rendered, and which the party recovering and claiming the right to offset has a clear right to enforce; it must have been rendered by a court which had jurisdiction<sup>3</sup> and must be final; this right of set-off cannot be asserted pending an appeal from the judgment.<sup>4</sup> An appeal, however, [312] only suspends the right to set-off, and the court may stay proceedings on the other judgment for the protection of that

<sup>1</sup> Chase v. Woodward, 61 N. H. 79; Hovey v. Morrill, id. 9, 60 Am. Rep. 315; Brown v. Hendrickson, 39 N. J. L. 239; Matson v. Oberne, 25 Ill. App. 213; Alexander v. Durkee, 112 N. Y. 655, 19 N. E. Rep. 514; Mitchell v. Oldfield, 4 T. R. 123; Williams v. Evans, 2 McCord, 203; Tolbert v. Harrison, 1 Bailey, 599; Herrick v. Bean, 20 Me. 51; Temple v. Scott, 3 Minn. 419; Makepeace v. Coates, 8 Mass. 451; Greene v. Hatch, 12 id. 195; Ames v. Bates, 119 id. 397; Mason v. Knowlson, 1 Hill, 218; Harris v. Palmer, 5 Barb. 105; Noble v. Howard's Ex'r, 2 Hayw. 14; Holmes v. Robinson, 4 Ohio, 90; Meadow v. Rhyne, 11 Rich. 631; Benjamin v. Benjamin, 17 Conn. 110; Cooper v. Bigalow, 1 Cow. 296. See Zogbaum v. Parker, 55 N. Y. 120.

<sup>2</sup> De Camp v. Thomson, 159 N. Y.

444, 54 N. E. Rep. 11, 70 Am. St. 570; Brown v. Hendrickson, 39 N. J. L. 239; Davidson v. Geoghagan, 3 Bibb, 233; Makepeace v. Coates, 8 Mass. 451; Simson v. Hart, 14 Johns. 63, 757.

<sup>3</sup> Harris v. Palmer, 5 Barb. 105.

<sup>4</sup> Pierce v. Tuttle, 51 How. Pr. 193; Hardt v. Schulting, 24 Hun, 345; De Figanieri v. Young, 2 Robert. 670; Zerbe v. Missouri, etc. R. Co., 80 Mo. App. 414; Spencer v. Johnston, 58 Neb. 44, 78 N. W. Rep. 482; De Camp v. Thomson, 159 N. Y. 444, 54 N. E. Rep. 11, 70 Am. St. 570.

If a writ of error does not operate as a *supersedeas* an intention to obtain a review of a judgment will not interfere with the allowance of a set-off. Sowles v. Witters, 40 Fed. Rep. 413. See Haskins v. Jordan, 123 Cal. 157, 55 Pac. Rep. 786.

right until the appeal is determined.<sup>1</sup> In the exercise of this jurisdiction courts will act upon the equitable as well as legal interests and relations of the parties. Applications for such set-off, not being founded on any statute or governed by any fixed or arbitrary rule, are addressed to the discretion of the court, and its discretion will be so exercised as to do equity and not to sanction fraud<sup>2</sup> or oppression.<sup>3</sup> The fact that a plaintiff

<sup>1</sup> *Pierce v. Tuttle, supra*; *Terry v. Roberts*, 15 How. Pr. 65.

In *Irvine v. Myers*, 6 Minn. 562, it was held that where the right of set-off was suspended by appeal after a motion made, it might remain undecided until the final determination of the appeal.

In *Blackburn v. Reilly*, 48 N. J. L. 82, 2 Atl. Rep. 817, it is held that after the affirmance of a judgment by the appellate court and the return of the record to the trial court, the latter may stay the execution of such judgment for the purpose of setting it off against a counter judgment.

<sup>2</sup> *Tolbert v. Harrison*, 1 Bailey, 599; *Meador v. Rhyne*, 11 Rich. 631.

<sup>3</sup> *Williams v. Evans*, 2 McCord, 203. W. had obtained judgment against E. for \$188; subsequently E. obtained a judgment in trover against W. for \$240. W., instead of moving to have his judgment set off against the larger one which had been recovered against him, issued a *ca. sa.* against E. and then assigned his judgment to a third person for value. E. was imprisoned on the *ca. sa.*, and so remained until he died. At the next term, W., who seems to have repossessed himself of the judgment recovered by him, moved to have it set off against that obtained by E. On a motion to rescind an order allowing such set-off, Nott, J., said: "There is no doubt but that the court has the power to order mutual judgments to be set off against each other. This is a common-law power, and is

not derived from the act authorizing parties to set off mutual debts.

. . . If it constitute a part of the equitable jurisdiction of the court, it ought to be so exercised as to do equity and not to sanction fraud; and a person who wishes to have the benefit of it ought to avail himself of the earliest opportunity to make his application, and not to delay until the interests of third persons have become involved. If the party in this case had made his application at the court when his judgment was obtained, it ought to have been granted. He had three methods of proceeding: one, that which he is now endeavoring to pursue; another by *fi. fa.* against the goods of the defendant; and the third by taking his body in execution. He chose the latter, and after having made his election (and particularly under the circumstances of this case), he ought to be bound by it; at least he can have no high claim to the assistance of the court to relieve him from the difficulty of his own voluntary creation. It is true a judgment is not a negotiable instrument; nevertheless, an assignment conveys an equitable interest to the assignee, such as a court of law will notice and respect in all cases of appeal to its discretion. *Newman v. Crocker*, 1 Bay, 246. A bond is not negotiable, and yet this court would so far respect the assignee of one as not to permit a judgment recovered upon it to be set off against one recovered by the

against whom a judgment for costs has been rendered has begun another action against the defendant for a larger amount will not prevent said judgment being offset against a judgment in favor of the defendant, since the latter judgment would be a proper set-off or counter claim against such demand as the plaintiff holds against the defendant.<sup>1</sup> The discretion of a court in acting upon a motion to set off judgments will not be reviewed if the motion is denied.<sup>2</sup> In exercising their power courts will consider the rights of persons who are not parties to the action.<sup>3</sup> If a party who is entitled to a set-off has a special fund which is primarily applicable to the satisfaction of his judgment or decree he will not be permitted to avail himself of his right against the holder of an opposing judgment or decree until such fund is exhausted, and then only for any balance of his demand which is unsatisfied.<sup>4</sup> A set-off of judgments will not be allowed if it will result in depriving a debtor of property which is exempt from execution.<sup>5</sup> Were it otherwise A. might get judgment against B.,

obligee. The plaintiff, by taking the body of the defendant, had voluntarily relinquished every other claim upon him; and the claim which he now has upon his property is revived only by the accidental circumstance of his death. Suppose the assignee of this judgment had enforced an execution against W. in the life-time of E. and during the time he had his body in execution, could W. have required that money, while in the hands of the sheriff, to be paid over to him? Certainly not; because, having taken the body in execution, he must have been contented with it; he could not have double satisfaction. A release of E. from custody would have been a release of the debt. He had a mild and easy method of enforcing the payment of his debt, if he had chosen to make use of it. Instead of which he resorted to the most rigorous and unfeeling known to the law; like another Shylock, he would have nothing short of his flesh; and having no

longer the means of gratifying his vengeance, he now comes and asks this court to take from a humane and merciful creditor a vested right, to satisfy a debt which he had it in his power to receive, and which he voluntarily relinquished to gratify a vindictive passion. The motion must be granted." See *Cooper v. Bigalow*, 1 Cow. 206.

<sup>1</sup> *Welsher v. Libby*, 107 Wis. 47, 82 N. W. Rep. 693.

<sup>2</sup> *Chipman v. Fowle*, 130 Mass. 352.

<sup>3</sup> *Meador v. Rhyne*, 11 Rich. 631; *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. 36, 9 S. E. Rep. 1058.

<sup>4</sup> *Nuzum v. Morris*, 25 W. Va. 559. See *Payne v. Webb*, 29 id. 627, 2 S. E. Rep. 330.

<sup>5</sup> *Butner v. Bowser*, 104 Ind. 255, 3 N. E. Rep. 889; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Junker v. Hustes*, 113 Ind. 524; *Beckman v. Manlove*, 18 Cal. 388; *Duff v. Wells*, 7 Heisk. 17; *Collett v. Jones*, 7 B. Mon. 586; *Johnson v. Hall*, 84 Mo. 210. *Contra*, *Temple v. Scott*, 3

seize and sell his exempt horse and obtain partial satisfaction of the judgment from the proceeds of such sale. If B. should then recover a judgment for damages against A. the latter might set off the unsatisfied portion of his judgment against it. Thus B. would lose his horse, and A., by a violation of the law, would collect a portion of his judgment against an insolvent debtor. B.'s judgment ought to take the place of his horse. But this exemption from liability to set-off is not to be extended to judgments in favor of the owner of exempt property for damages for its wrongful taking in attachment proceedings, the property being in his possession.<sup>1</sup> A court of equity may set off judgments when courts of law cannot because they are not between the same parties. But this will not be done unless the moving party shows equitable ground for it; he must make it appear that his rights are superior to any equitable right in favor of the other party.<sup>2</sup>

§ 200. **Interest of the real parties considered.** The [313] parties beneficially interested may assert their right, and a set-off between the nominal parties will be refused where it would be prejudicial to those having equitable interests.<sup>3</sup> Thus, a court will not order a judgment against an executor in his own right to be set off against a judgment in his favor on a promissory note taken for goods of his testator, sold by him, if it appear that the creditors or legatees of the testator will be thereby prejudiced.<sup>4</sup> A debtor to the estate of a decedent,

Minn. 419, ruled by a divided court, and on the theory that exemption statutes are to be strictly construed; a rule opposed to the great weight of authority. Sutherland's Stat. Const., §§ 420-422. See Mallory v. Morton, 21 Barb. 424.

<sup>1</sup>Johnson v. Hall, 84 Mo. 210.

<sup>2</sup>Howe Machine Co. v. Hickox, 106 Ill. 461.

The Rhode Island statute governing the right to set off judgments and executions applies only to cases in which the parties are reversed and sue and are sued in the same right; the suits must also be pending at the same time. Hopkins v. Drowne, 21 R. I. 80, 51 Atl. Rep. 1010.

<sup>3</sup>Daniel v. Bush, 80 Ga. 218, 4 S. E. Rep. 271.

<sup>4</sup>Tolbert v. Harrison, 1 Bailey, 599. In this case the court say: "The note given to the executor for a contract made with him must be treated and considered as his own. In a legal point of view it was the note of Sterling Harrison to Jos. S. Tolbert. It is, however, unquestionable that in fact it was a part of the assets of the estate of his testator; and the executor might and ought to have treated it as such. He, on the present occasion, claims that it should be considered as the assets of the estate. This is the equity of the case; and the court of equity, in the exercise of the

against whom a judgment has been obtained by the administrator in favor of such estate, is entitled to set off against such judgment claims proved against the estate, and which existed in the debtor's favor prior to the death of the de-

jurisdiction which legitimately belongs to it over trustees, will follow a note of hand as the property of an estate if really taken for assets of the estate sold by the administrator, though the note be taken in the private name of the administrator. *Glass v. Baxter*, 4 Desaus. 153. The question is whether this court is bound by legal rules to set off judgments in all cases where they are in the same right. It is clear that it is not."

In *Ames v. Bates*, 119 Mass. 397, W. purchased of A. a claim against B. pending an action by A. upon the claim. B. had previously purchased a claim against A. and had given notice thereof to A. Suit was brought thereon by B. in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. Held, that judgment for the plaintiff in the second action could not be set off against judgment for the plaintiff in the first action. The court say: "While there is no express statute authority for setting off judgments where the creditor in one action is the debtor in another, except in a limited number of cases (Gen. Stats., ch. 126, §§ 2, 3, 5), yet this power has been frequently exercised by courts of law, and rests upon their jurisdiction over suitors in them and their general superintendence of proceedings before them. *Makepeace v. Coates*, 8 Mass. 451; *Greene v. Hatch*, 12 Mass. 195. Such a power is only to be exercised upon careful consideration of all the circumstances of the transactions out of which the judgments arise, and

in order to protect the just rights of parties. In the present case the nominal parties to the judgments are not the same, nor is the equitable owner of the judgment recovered in the name of Ames the defendant in the suit of which Bates is the equitable owner. But even if Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another, when he could not have set off the claim upon which the judgment was founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that it is not just that one should be encouraged, instead of paying his own debt, to seek out claims against his creditor in order thus to change the position of parties *pendente lite*; and this reason is equally applicable to judgments which may afterwards be obtained upon such claims. However this might be as to Ames himself, it is clear that as to the assignee of Ames, Bates should not be allowed to effect this change. When the equitable rights of third parties would be affected by an offset of this character it is not to be made to the injury of intervening rights honestly acquired. *Greene v. Hatch*, *ubi supra*; *Zogbaum v. Parker*, 55 N. Y. 120; *Gay v. Gay*, 10 Paige, 369; *Ramsey's Appeal*, 2 Watts, 228."

In *Carter v. Compton*, 79 Ind. 37, T. obtained judgment against the estate of S. on a note. The executors of S. held a note of a later date against T., which was executed to

cedent, but not claims assigned to him after his death. As to these last it was said the rights of the administrators and the creditors had become fixed by the decedent's death; the claim against the assignee had become assets of the estate, in which its creditors and the administrators had an interest.<sup>1</sup> Set-off will not be allowed in favor of the [314] nominal judgment creditor where it appears that before the judgment was obtained the cause of action had been as- [315] signed to a third person.<sup>2</sup> But if the right exists at the time of the assignment of a judgment, the assignee will stand only in the shoes of the assignor.<sup>3</sup> The assignee of a judgment is not affected by equities which arise between the parties to it subsequent to the assignment.<sup>4</sup> Nor is the assignee of all

them in their representative capacity. Judgment upon it was set off against the first mentioned judgment.

<sup>1</sup> *Wikel v. Garrison*, 82 Iowa, 453, 48 N. W. Rep. 803.

<sup>2</sup> *Swift v. Prouty*, 64 N. Y. 545; *Perry v. Chester*, 53 N. Y. 240; *Mackey v. Mackey*, 43 Barb. 58; *Turner v. Satterlee*, 7 Cow. 480; *Nash v. Hamilton*, 3 Abb. Pr. 35.

It is held in *Williams v. Taylor*, 69 Ind. 48, that if at the time a judgment is pleaded in set-off the equitable title to it is in one person and the legal title in another, the latter will prevail.

<sup>3</sup> *Skinker v. Smith*, 48 Mo. App. 91; *Irvine v. Myers*, 6 Minn. 502; *Jaeger v. Koenig*, 32 N. Y. Misc. 244, 65 N. Y. Supp. 795; *Lammers v. Goode-man*, 69 Ind. 76; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. Rep. 17; *Peirce v. Bent*, 69 Me. 381; *Wells v. Clarkson*, 5 Mont. 336, 5 Pac. Rep. 894; *Brown v. Hendrickson*, 39 N. J. L. 239; *Chamberlin v. Day*, 3 Cow. 353; *Ferguson v. Bassett*, 4 How. Pr. 168; *Noxon v. Gregory*, 5 id. 339; *Cooper v. Bigalow*, 1 Cow. 56, 206; *Turner v. Crawford*, 14 Kan. 499. See *Duncan v. Bloomstock*, 2 McCord, 318; *Ramsey's Appeal*, 2 Watts, 228.

"Cases often occur in which the set-off of one judgment against another is allowed regardless of a prior assignment of one to a third person. Such cases are, where the assignee has taken the judgment charged with notice of the right of set-off as an existing defense (*Rowe v. Langley*, 49 N. H. 395); where, through insolvency of the assignor at the time of the assignment, the party claiming the right of set-off had no other means of collecting his debt (*Gay v. Gay*, 10 Paige, 369, 375); and where, in anticipation of an application to make the set-off, the assignment was made for the purpose of defeating the right. *Duncan v. Bloomstock*, 2 McCord, 318. In all cases where the assignment is without consideration, not in good faith, or fraudulently made to defeat the application, the court will direct the set-off to be made. *Cross v. Brown*, 51 N. H. 486; *Hurst v. Sheets*, 14 Iowa, 322; *Russell v. Conway*, 11 Cal. 93; *Morris v. Hollis*, 2 Harr. 4; *Duncan v. Bloomstock*, *supra*." *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315.

<sup>4</sup> *Wyll v. Barwise*, 43 Minn. 171, 45 N. W. Rep. 11.

rights and demands under a contract charged with notice of such of its stipulations as are wholly distinct from that portion of it which he is concerned with; as where an instrument provides for closing up an existing, and also for carrying on a new, business. The subject-matters are so disassociated that they are several contracts. Hence the assignee of rights under the clause relating to prosecuting a new business is not charged with knowledge of the existence of a judgment against his assignor on account of a breach of the other provision, and such judgment cannot be set off against one subsequently rendered in his favor.<sup>1</sup> As between two persons who hold judgments by assignments, the one prior in time has the right to be paid first by the judgment he holds, and such judgment is not subject to set-off by the assignor of it who subsequently purchased an assignment of a judgment against the holder.<sup>2</sup> The assignee of a judgment which was bought without notice of any offsets thereto cannot be denied the right to enforce it by injunction proceedings because the defendant seeks to offset against it a judgment recently rendered against the plaintiff upon demands bought by him before the transfer of the judgment for the purpose of being used in offset, notwithstanding the plaintiff is insolvent.<sup>3</sup> The valid assignment of a judgment does not affect the judgment debtor's right to thereafter have a judgment in his favor against the assignor rendered in another action, before the assignment was made, set off against the judgment assigned.<sup>4</sup>

§ 201. **Set-off not granted before judgment.** The right does not attach on the recovery of a verdict merely, and if that be assigned before judgment thereon is rendered it is not subject to a set-off of a judgment against the assignor.<sup>5</sup> But this

<sup>1</sup> *Howe Machine Co. v. Hickox*, 106 Ill. 461.

<sup>2</sup> *McAdams v. Randolph*, 42 N. J. L. 332; *Gauche v. Milbrath*, 105 Wis. 355, 81 N. W. Rep. 487; *Wright v. Wright*, 70 N. Y. 96; *Terney v. Wilson*, 45 N. J. L. 282.

<sup>3</sup> *Dutton v. Mason*, 21 Tex. Civ. App. 389, 52 S. W. Rep. 651. See 2 *Freeman on Judgments*, § 427; *Lundgreen v. Stratton*, 79 Wis. 227, 48 N. W. Rep. 426.

<sup>4</sup> *Benson v. Haywood*, 86 Iowa, 107, 53 N. W. Rep. 85, 23 L. R. A. 335.

<sup>5</sup> *Graves v. Woodbury*, 4 Hill, 559, 40 Am. Dec. 296; *Bagg v. Jefferson C. P.*, 10 Wend. 615; *People v. Judges, etc.*, 6 Cow. 598; *Garrick v. Jones*, 2 Dowl. P. C. 157; *Wood v. Merritt*, 45 How. Pr. 471; *Spencer v. Johnston*, 58 Neb. 44, 78 N. W. Rep. 482. See *McAdams v. Randolph*, 42 N. J. L. 332; *Patterson v. Ward*, 8 N. D. 87, 76 N. W. Rep. 1046.



rule is not to be applied with technical strictness. In a late case it was said: The defendant in this action has recovered a verdict against this plaintiff in a suit growing out of the same transaction. The case came to the law court upon a motion for a new trial, which has been overruled, and judgment will be ordered upon the verdict—the announcement of the decision being made simultaneously with this. The counsel for the plaintiff in these cases has moved that the judgments, when recovered, both amounting to a less sum than the judgment that will be recovered by this defendant, be set off against the judgment in favor of this defendant, *pro tanto*. This should be done, but not so as to affect the attorney's lien upon the taxable costs in each case.<sup>1</sup>

§ 202. Assignee must make an absolute purchase. The assignee of a judgment, to be entitled to assert this right of set-off, must acquire the judgment absolutely.<sup>2</sup> If the purchase is made on the condition that the motion for set-off is successful, and otherwise to be void, the ownership is not acquired with sufficient absoluteness to enable the assignee to use it as a set-off.<sup>3</sup> An assignment upon condition of a rescission of the transfer in case the assignee cannot avoid a set-off is not sufficiently absolute.<sup>4</sup> Nor will an assignment of a judgment to be collected for the assignor, less compensation for collecting, confer the requisite ownership.<sup>5</sup> A party seeking to set off a judgment in his favor against one recovered against him should be the owner of the judgment in his own right.<sup>6</sup> The [316] mutual judgments should be in the same right.<sup>7</sup> It is imma-

<sup>1</sup> Howe v. Klein, 89 Me. 376, 36 Atl. Rep. 620.

<sup>2</sup> Jones v. Chalfant, 55 Cal. 505.

<sup>3</sup> Butler v. Niles, 26 How. Pr. 61, 35 id. 329.

<sup>4</sup> Gilman v. Van Slyck, 7 Cow. 469.

<sup>5</sup> Porter v. Davis, 2 How. Pr. 30. It was held in Butler v. Niles, *supra*, that even if a plaintiff, in an action to procure a set-off of a judgment, be entitled to set off the judgment assigned to him against one recovered against himself, he cannot make use of such assigned judgment to defeat the incident claims for costs growing

out of proceedings instituted before the assignment, if properly commenced. Such proceedings may have been legitimate and necessary consequences of the judgment when taken; and he has no right to take away the foundation of such proceeding, if still pending, by satisfying the judgment with those held by him. It is not equivalent to payment and acceptance in satisfaction *pendente lite*.

<sup>6</sup> Mason v. Knowlson, 1 Hill, 218.

<sup>7</sup> Holmes v. Robinson, 4 Ohio, 90.

Although where one of the parties

terial in whose names they were respectively recovered; the right of set-off exists between the several beneficial owners and is confined to them. It is no objection that the mutual judgments are not nominally due to and from the same number of persons;<sup>1</sup> if the equitable claims of many become vested in one, they may be set off against separate demands, and *vice versa*.<sup>2</sup>

§ 203. **Nature of action immaterial.** Nor is it material what was the original cause of action, whether in tort or contract; when a final judgment is obtained the original cause is merged, the judgment becomes technically a contract of record, and on motion it may be made to mutually compensate and satisfy another.<sup>3</sup> Nor is it necessary that both judgments should be recovered in the same court.<sup>4</sup> The motion should

in two cross-actions has assigned his interest to a third party there may be no right to set off the judgments, yet, where the assignee, being the real plaintiff in one action, is also the real defendant in the other, there is such right of set-off. *Standeven v. Murgatroyd*, 27 L. J. (Ex.) 425.

<sup>1</sup> *Id.*; *Simson v. Hart*, 14 Johns. 63, 75; *Peirce v. Bent*, 69 Me. 381, holding that a judgment in favor of a principal alone may be applied in satisfaction of one against him and his sureties.

In *Brown v. Hendrickson*, 39 N. J. L. 239, it is said that in testing the right to a set-off it is not necessary that the judgments should be in the same right; it is enough if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be satisfied by the set-off, provided it is not in a representative capacity. To the same effect, *Skinker v. Smith*, 48 Mo. App. 91.

Under the Missouri statute a judgment in favor of the attachment plaintiff on the cause of action counted on in the attachment suit may be set off against the damages recovered by the attachment defend-

ant for the improper attachment, although such judgment is against the relator and another who was not a party in the attachment proceeding, since the judgment plaintiff has a right to receive satisfaction of his judgment from one of his two judgment debtors. *State v. Hudson*, 86 Mo. App. 501.

<sup>2</sup> *Id.*; *Buller's Nisi Prius*, 336.

<sup>3</sup> *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Langston v. Roby*, 68 Ga. 406; *Sowles v. Witters*, 40 Fed. Rep. 413, holding that a decree in equity may be set off against a judgment at law; *Howell v. Shands*, 35 Ga. 66; *King v. Hoare*, 13 M. & W. 494, 504.

<sup>4</sup> *How v. Klein*, 89 Me. 376, 36 Atl. Rep. 620; *Skinker v. Smith*, 48 Mo. App. 91; *Aldrich v. Blatchford*, 175 Mass. 396, 56 N. E. Rep. 700, 78 Am. St. 503; *Robinson v. Kunzeleman*, 117 Mich. 193, 75 N. W. Rep. 451; *Taylor v. Williams*, 14 Wis. 155; *Kimball v. Munger*, 2 Hill, 364; *Barker v. Braham*, 2 W. Black. 869; *Hall v. Ody*, 2 B. & P. 29; *Bridges v. Smyth*, 8 Bing. 29; *Bristowe v. Needham*, 7 M. & G. 648; *Coxe v. State Bank*, 8 N. J. L. 472; *Noble v. Howard's Ex'r*, 2 Hayw. 14; *Ewen v. Terry*, 8 Cow. 126; *Ross v. Hicks*, 11 Barb. 481; *Ir-*

be made in the court where the judgment against the moving party was obtained.<sup>1</sup> And the moving papers should be entitled in all the causes, whether in the same court or not.<sup>2</sup> In some states the motion may be made in the court in which one or both of the actions are pending.<sup>3</sup> If the judgments are in different courts all difficulty in accomplishing the practical result is obviated, if the party desiring the set-off makes his application in the court where the judgment exists against him, for the court can then make its action in satisfying, either in whole or in part, its own judgment conditioned upon such applicant making reciprocal satisfaction of the judgment in his favor standing in another court.<sup>4</sup>

§ 204. **Liens of attorneys.** In England for a long time there were two conflicting rules as to the right of a judgment debtor to set off a judgment in disregard of the lien of his attorney. Such right was denied by the court of king's bench if the exercise of it affected the attorney's lien for costs.<sup>5</sup> The common pleas courts held that the equitable rights of the parties were superior to the attorney's lien.<sup>6</sup> In 1853 the rules adopted made the practice in the king's bench applicable to all the courts, while the judicature act of 1873 adopted the other rule. The rule of the common pleas has been adopted in many jurisdictions in this country;<sup>7</sup> while others follow

*vine v. Myers*, 6 Minn. 562. *Contra*, *Tenant v. Marmaduke*, 5 B. Mon. 76.

In *Schautz v. Kearney*, 47 N. J. L. 56, a decree in admiralty rendered by a federal court was set off against a judgment recovered in a state court.

<sup>1</sup> *Brookfield v. Hughson*, 44 N. J. L. 285; *Taylor v. Williams*, 14 Wis. 155; *Dunkin v. Vandenberg*, 1 Paige, 622; *Cooke v. Smith*, 7 Hill, 186; *Ross v. Hicks*, 11 Barb. 481; *Russell v. Conway*, 11 Cal. 93.

<sup>2</sup> *Alcott v. Davison*, 2 How. Pr. 44. In North Carolina the practice has been to set off judgment by *scire facias*. *Noble v. Howard's Ex'r*, 2 Hayw. 14.

<sup>3</sup> *Peirce v. Bent*, 69 Me. 381.

<sup>4</sup> *Welsher v. Libby*, 107 Wis. 47, 82 N. W. Rep. 693.

<sup>5</sup> *Mitchell v. Oldfield*, 4 T. R. 123.

<sup>6</sup> *Schoole v. Noble*, 1 H. Black. 23.

<sup>7</sup> *Benjamin v. Benjamin*, 17 Conn. 110; *Turner v. Crawford*, 14 Kan. 499; *Sanders v. Gillett*, 8 Daly, 183; *Nicoll v. Nicoll*, 16 Wend. 446; *Roberts v. Carter*, 24 How. Pr. 44; *Brooks v. Hanford*, 15 Abb. Pr. 342; *Hayden v. McDermott*, 9 id. 14; *People v. New York C. P. C.*, 13 Wend. 649; *Hovey v. Rubber Tip Pencil Co.*, 14 Abb. Pr. (N. S.) 66; *Watson v. Smith*, 63 Iowa, 228, 18 N. W. Rep. 916; *Mosely v. Norman*, 74 Ala. 422; *Wright v. Treadwell*, 43 Md. 212; *Fairbanks v. Devereux*, 58 Vt. 359, 3 Atl. Rep. 500; *Bosworth v. Tallman*, 66 Wis. 533, 29 N. W. Rep. 542.

In New York, since the enactment of 1879, no set-off is allowed as

that of the king's bench.<sup>1</sup> But where the equitable power of a court is invoked by motion the statute of set-off is not the [317] obligatory guide, and the court, proceeding upon its own discretion, will sustain the attorney's lien and give it preference.<sup>2</sup> An attorney has a lien for his costs upon money recovered by his client or awarded him in a cause in which the attorney was employed, in case the money has come into his hands; or he may stop it *in transitu* by giving notice to the opposite party not to pay it until his claim for costs is satisfied, and then moving the court to have the amount thereof paid to him in the first instance. And if, notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien; and the latter in such case will not be prejudiced by any collusive release given by his client. But unless such notice is given the client may compromise with the opposite party, and give him a release without the intervention of his attorney; and he in that event can afterwards look to his client only for payment.<sup>3</sup> This lien has sometimes been supposed to be confined to some fixed and certain amount allowed to an attorney by statute, and that it does not extend to a *quantum meruit* claim for his services.<sup>4</sup>

against the lien of an attorney. *Ennis v. Curry*, 22 Hun, 584; *Naylor v. Lane*, 66 How. Pr. 400, 18 J. & S. 97.

<sup>1</sup> *Howe v. Klein*, 89 Me. 376, 36 Atl. Rep. 620; *Currier v. Boston & M. R. Co.*, 37 N. H. 223; *Stratton v. Hussey*, 62 Me. 286; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Dunklee v. Locke*, 13 Mass. 525; *Boyer v. Clark*, 3 Neb. 161; *Robertson v. Shutt*, 9 Bush, 659; *Carter v. Davis*, 8 Fla. 183; *Candle v. Rice*, 78 Ga. 81. See *Langston v. Roby*, 68 id. 406.

<sup>2</sup> *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. 36, 9 S. E. Rep. 1058; *Diehl v. Friester*, 37 Ohio St. 473; *Ward v. Wordsworth*, 1 E. D. Smith, 598; *Haight v. Holcomb*, 16 How. Pr. 163; *Peckham v. Barcalow*, *Lalor's Supp.* 112; *Smith v. Lowden*, 1 Sandf. 696; *Gihon v. Fryatt*, 2 id. 638; *Sweet v. Bartlett*, 4 id. 661; *Roberts v. Carter*, 17 How. Pr. 341, 24 id. 44; *Martin v.*

*Kanouse*, 17 id. 146; *De Figanieri v. Young*, 2 Robert. 670; *Hovey v. Rubber Tip Pencil Co.*, 14 Abb. Pr. (N. S.) 66; *Bishop v. Garcia*, id. 69.

<sup>3</sup> *Graham* Pr. 61; *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 93; *Wilkins v. Batterman*, 4 Barb. 47; *Ten Broeck v. De Witt*, 10 Wend. 617; *Bradt v. Koon*, 4 Cow. 416; *Martin v. Hawks*, 15 Johns. 405; *Chapman v. Haw*, 1 Taunt. 341; *Omerod v. Tate*, 1 East, 464; *Turwin v. Gibson*, 3 Atk. 720; *Read v. Dupper*, 6 T. R. 361; *Wilkins v. Carmichael*, 1 Doug. 101; *Schoole v. Noble*, 1 H. Black. 23; *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Bishop v. Garcia*, 14 Abb. Pr. (N. S.) 69.

<sup>4</sup> *Ex parte Kyle*, 1 Cal. 332; *Davenport v. Ludlow*, 4 How. Pr. 337; *Benedict v. Harlow*, 5 id. 347. But a more reasonable view, in the writer's

A distinction has been made as to the right of set-off when the judgments are in the same action, or in actions growing out of the same subject-matter, and where the judgments are in actions having no connection with each other. In the former class of cases the right is generally deemed superior to the claim of the attorney in either action for his services and disbursements;<sup>1</sup> in the latter the equitable right of the attorney who has rendered services and incurred expenses in obtaining one of such judgments, to be paid out of it, is deemed superior to the right of the judgment debtor to have that judgment paid by applying upon it the judgment owned by him against his judgment creditor, the assignment being made *bona fide* before the right of set-off attaches.<sup>2</sup>

judgment, is to be found in the able opinion of Daly, J., in *Ward v. Wordsworth*, 1 E. D. Smith, 598, where it is held that the abolition by the code of all statutes regulating the fees of attorneys, and of all rules or provisions of law preventing an attorney from agreeing with his client for his compensation, and leaving the measure thereof to the contract of the parties, has not af-

fected the right of the attorney to his lien.

<sup>1</sup> *Yorton v. Milwaukee, etc. R. Co.*, 62 Wis. 367, 21 N. W. Rep. 516, 23 id. 401.

<sup>2</sup> *Gauche v. Milbrath*, 105 Wis. 355, 81 N. W. Rep. 487; *Benjamin v. Benjamin*, 17 Conn. 110; *Diehl v. Frierster*, 37 Ohio St. 473; *Wells v. Elsam*, 40 Mich. 218; *Kinney v. Robison*, 52 Mich. 389, 18 N. W. Rep. 120.

## CHAPTER VI.

## PECUNIARY REPRESENTATIVE OF VALUE.

## SECTION 1.

## MONEY.

- § 205. Characteristics of money.
- 206. Payment to be made in money of country of performance.
- 207. Payment in currency.
- 208. Effect of changes in the value of money.
- 209. Value of money at time of contracting.
- 210. The legal tender act.
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## SECTION 2.

## PAR AND RATE OF EXCHANGE.

- 212. Par of exchange.
- 213. Rate of exchange.

## SECTION 1.

## MONEY.

[318] § 205. **Characteristics of money.** All civilized nations have some method or system of pecuniary remuneration, based upon an arbitrary unit of value sanctioned by law. By it accounts are kept, the amounts of debts and judgments expressed, and wealth computed. They have, also, gold and silver coins, either representing that unit or some multiple of it, or other value estimated with reference to it. These are of intrinsic value, and being made and issued by the sovereign power are acceptable to everybody and therefore have universal currency as a convenient and necessary medium of exchange and payment. They are money in the strict sense.

[319] All pecuniary obligations are measured by and expressed in the value they represent, and are solvable by them. Nor can such obligations be otherwise liquidated or paid, except by agreement, unless the state which has the power to coin money prescribes some other form of legal money. The precious metals, being valued according to a uniform and fixed

standard, are the only proper measure of value. Their value is determined by weight and purity, and the impress on the coins is a certificate so generally relied upon that the pieces readily pass for their nominal value by count.

Money is cosmopolitan. A contract which is a money contract where it is entered into and to be performed is a money contract everywhere. To this extent the money of one nation is treated as money by another, as distinguished from a mere chattel or a commodity. Thus, money lent in India in *pagodas*, and sued for in England as money lent, was held recoverable in that form. It was contended that the averment that the defendant was indebted for "lawful money of Great Britain" was not supported; but Gibbs, J., said, "the doctrine contended for has been exploded these thirty [320] years."<sup>1</sup> The real meaning of such a count was afterwards explained to be that the defendant is indebted for money of such a value or amount in English money.<sup>2</sup> So a contract made and to be performed in the same country, for the payment of what is money at the time of contracting, will be held a money contract after that currency has been abolished and another entirely different has been substituted.

§ 206. **Payment to be made in money of country of performance.** Contracts for the payment of money are deemed payable in the legal money of the country where payment is to be made, unless a contrary intention appears; that [321] is, a contract for the payment within the United States of dollars is presumptively payable in dollars of our decimal currency. If a contract be made here, and even not within the law merchant, and between citizens of the United States, and to be performed here, for the payment of a sum stated in the denominations of a foreign currency, it is undoubtedly to be treated as a money contract, the same as if made and to be performed in the country where such currency is the legal money.<sup>3</sup> Debts have no *situs*; they are payable everywhere;

<sup>1</sup> *Harrington v. Macmorris*, 5 Taunt. 228.

<sup>2</sup> *Ehrensperger v. Anderson*, 3 Ex. 148. But see *McLachlan v. Evans*, 1 Y. & J. 380; *Pollock v. Colglazure*,

*Sneed*, 2; *Sheehan v. Dalrymple*, 19 Mich. 239.

<sup>3</sup> See *Mervine v. Sailor*, 52 Pa. 18; *Christ Church Hospital v. Fuechsel*, 54 id. 71; *Mather v. Kinike*, 51 id. 425; *Sears v. Dewing*, 14 Allen, 413.

and in every country where payment may be either tendered or demanded, they are strictly payable in the legal currency or money of that country, and in no other currency unless strictly at maturity. A sterling debt contracted or incurred in England, a debt payable in francs incurred in France, or a contract payable in pistoles entered into in Spain, when sought to be enforced or paid in the United States, is a contract for an equivalent amount payable only in the lawful money of the United States. The very currency in which the contract by its terms was payable, if tendered in this country after maturity, would be no legal offer of payment; it would not be a tender which would stop interest. Contracts made abroad, or payable in foreign currency, are treated as money contracts; but the money specified therein, if not tendered when due, is no longer the money in which the damages due would be computed, except within the jurisdiction where such money is the lawful currency.

§ 207. **Payment in currency.** Bank bills and other paper currency circulate as money. It is not strictly such, for no debtor has a legal right to discharge a money obligation with such currency unless it is made legal tender by law; the creditor may refuse to receive it; but when it is paid and received, it is paid and received as money. The receipt of bank bills, dollar for dollar, upon a debt, is not conditional payment, depending on diligence of the payee in presenting the bills to [322] the bank and obtaining legal-tender funds, nor is it accord and satisfaction.<sup>1</sup> A contract payable in currency or in

<sup>1</sup> *Solomon v. Bank of England*, 13 East, 135; *Pickard v. Bankes*, id. 20; *Corbit v. Bank of Smyrna*, 2 Harr. 235, 30 Am. Dec. 635; *Ware v. Street*, 2 Head, 609; *Magee v. Carmack*, 13 Ill. 289; *Lightbody v. Ontario Bank*, 11 Wend. 1; *Ontario Bank v. Lightbody*, 13 id. 101; *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Westfall v. Braley*, 10 Ohio St. 188, 75 Am. Dec. 509; *Harley v. Thornton*, 2 Hill (S. C.), 509, n. See *Keating v. People*, 160 Ill. 480, 486, 43 N. E. Rep. 724.

In *Maynard v. Newman*, 1 Nev. 271, Beatty, J., said: "Money means anything which passes current as the common medium of exchange and measure of value for other articles, whether it be the bills of private or incorporated banks, government bills of credit, treasury notes or pieces of coined metal. Money is anything which by law, usage or common consent becomes a general medium by which the value of other commodities is measured and denominated. Paper money is distinguishable from other negotiable paper, such as notes, bills of exchange, etc., because it is always,



funds, qualified by any term which imports money, is a money contract. A check for "current funds" calls for current money—par funds, money circulating without discount.<sup>1</sup> This term, as

after once put in circulation, payable to bearer, not to order; because it is made to represent convenient amounts for the ordinary transaction of business, is printed and written on paper not easily worn out, and therefore capable of being passed from hand to hand for a long time without destruction. By general consent it is used and treated as money and not as negotiable paper. If one indorses his name on such a note he does not thereby become responsible for the insolvency of the bank, but merely guarantees that the note is not a counterfeit. Neither the courts of law, nor the community, treat such paper as negotiable securities, but as *money*, something which is used as a general representative and measure of values." *Woodruff v. Mississippi*, 66 Miss. 298, 6 So. Rep. 335.

A genuine silver coin worn smooth by use, not appreciably diminished in weight and identifiable, is a legal tender. *Jersey City & B. R. Co. v. Morgan*, 52 N. J. L. 60, 21 Atl. Rep. 783. See *United States v. Lissner*, 12 Fed. Rep. 840.

A genuine silver coin of the United States, distinguishable as such, though somewhat rare and differing in appearance from other coins of that government of like denomination and of later dates, is a legal tender. *Atlanta Con. Street R. Co. v. Keeny*, 99 Ga. 266, 25 S. E. Rep. 629, 33 L. R. A. 824.

A statute requiring an officer to pay out the same moneys received and held by him by virtue of his office does not include only coin and currency in circulation as money. Money, it was said, is a generic term, and may mean not only legal tender coin and currency, but also any

other circulating medium or any instrument or token in general use in the commercial world as the representatives of value. It includes whatever is lawfully and actually current in commercial transactions as the equivalent of legal tender coin and currency. Certificates of deposit or other vouchers for money deposited in solvent banks payable on demand are a most convenient medium of exchange and are extensively used in commercial and financial transactions to represent the money thus deposited. *State v. McFetridge*, 84 Wis. 473, 54 N. W. Rep. 1, 998, 20 L. R. A. 223; *State v. Hill*, 47 Neb. 456, 537, 66 N. W. Rep. 541.

<sup>1</sup> *Klauber v. Biggerstaff*, 47 Wis. 551, 3 N. W. Rep. 357, 32 Am. Rep. 773; *Marc v. Kupfer*, 34 Ill. 286. *Contra*, *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244.

That term was held to have a specific, legal and well known meaning which cannot be contradicted or explained by parol. See *Moore v. Morris*, 20 Ill. 255.

In *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756, it was held that a note payable in "current funds," in the absence of all evidence showing that anything else is current at the place of payment, must be regarded as payable only in such funds as are current by law.

"Current money" means "currency of the country," whatever is intended to and does actually circulate as money; every species of coin or currency; the specification of dollars in connection with those words serves only to measure the quantity of the notes or currency, not their value, which may be ascertained by proof. There is no distinction be-

well as "currency," excludes depreciated paper money.<sup>1</sup> A note payable in "current Florida money" is payable in good funds.<sup>2</sup> "Canada currency" is equivalent to lawful money of Canada.<sup>3</sup>

§ 208. **Effect of changes in the value of money.** The amount due by contract is sometimes subject to question by [323] reason of fluctuations in the value of the money in which the contract was made payable. These fluctuations may be caused by the state debasing the coins which represented that money, or by arbitrary changes in the value of existing denominations of the legal currency; and so the value of paper money will rise and fall with the fluctuations in the credit of its maker. Suppose a contract for the payment of \$100 made while the present decimal system is in force; and while that contract is pending congress revises that system and retains a dollar as a unit of value representing only fifty cents. Uninfluenced by any provision that the new dollar shall be a legal tender for all debts at their nominal value, would a hundred of these dollars discharge the principal of the debt under the supposed contract? The injustice of holding the affirmative is apparent. The new dollars would not be those of the contract; by paying a hundred of them the promisor does not pay the value which he undertook to pay, and which was expressed by the contract. He, of course, would be entitled to pay in the money which was lawful and current when the contract required payment to be made; but as the word "dollar" is but a representative of value, that value should be ascertained by the legal sense of the term when the contract was made. Though the parties contracted with a knowledge of the power of congress to make the subsequent changes, it does not follow that they impliedly agreed that the value stipulated to be paid, as fitly expressed in the contract, should be modified by an arbitrary change in the meaning of the terms which had been employed to express their in-

tween a note for so many dollars in currency and one for so many dollars "payable in currency." *Miller v. McKinney*, 5 Lea, 93; *Commissioners v. McCormick*, 4 Mont. 115, 133, 5 Pac. Rep. 287.

<sup>1</sup> *Springfield M. & F. Ins. Co. v. Tincher*, 30 Ill. 399; *Webster v. Pierce*, 35 Ill. 158.

<sup>2</sup> *Williams v. Moseley*, 2 Fla. 304.

<sup>3</sup> *Black v. Ward*, 27 Mich. 191.

tention. This view is so obviously just that it is a matter of surprise it should ever have been questioned.<sup>1</sup>

§ 209. Value of money at time of contracting. When [324] a bill is drawn in one country payable in and in the coin of

<sup>1</sup> See 2 Daniel on Neg. Inst., § 1214; Story's Conf. Laws, §§ 313, 313a.

The case of Mixed Moneys, Davis, 28, rests on a contrary view. A bond was given for "£100 sterling current and lawful money of England," to be paid in Dublin, Ireland. Between the time of making the bond and its becoming due, Queen Elizabeth recalled the existing currency in Ireland and issued a new debased coinage called mixed money, declaring it to be lawful currency in Ireland. Of this debased coin a tender was made in Dublin, and it was held good. In a note to § 313a of Story's Conf. Laws, it is said: "The court do not seem to have considered that the true value of the English current money might, if that was required by the bond, have been paid in Irish currency, though debased, by adding so much more as would bring it to the par. And it is extremely difficult to conceive how a payment of current lawful money of England could be interpreted to mean current or lawful money of Ireland, when the currency of each kingdom was different, and the royal proclamation made a distinction between them, the mixed money being declared the lawful currency of Ireland only. Perhaps the desire to yield to the royal prerogative of the queen a submissive obedience as to all payments in Ireland may account for a decision so little consonant with the principles of law in modern times. Sir William Grant, quoting Vinnius, in *Pilkington v. Commissioner for Claims*, 2 Knapp, 18 to 21, affirms the better doctrine. 'He (Vinnius) takes the distinction, that if, between the time of contracting the debt and

the time of its payment, the currency of the country is depreciated by the state, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as will make it equal to the sum he borrowed.' But he says (and this seems contradictory of the foregoing), if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of £1 10s. by paying a guinea, although he borrowed the guinea when it was but 21s." And the case of *Reynolds v. Lyne's Ex'r*, 3 Bibb, 340, is in accord with that principle. A contract was made when a dollar was 5s. 9d. for the payment of a sum at a future day on the performance of a concurrent act of the payee. Before the money became payable, the state where the contract was made enhanced the value of the dollar to 6s. Subsequently payments were made and a dispute arose whether the money paid should be estimated at the rate of currency when the money was paid, or when the contract was made. Finally, the obligation in question was given for a balance of the original debt remaining by estimating the payment according to the value of a dollar at the date of the contract, viz., 5s. 9d., for which judgment at law had been rendered. The question arose on a bill in equity

[325] another, the value of which, intermediate the drawing and payment, is reduced by the government, it has been held that payment should be made according to the value of the money at the time the bill was drawn.<sup>1</sup> The common law cannot be deemed settled on this point; nor are the writers on the civil law in accord upon it. The opposite view is apparently based on the assumption that in money we do not regard the coins which constitute it, but only the value which the sovereignty has been pleased that they shall signify.<sup>2</sup> But coins have, in the world's exchanges, an intrinsic value which no sovereignty can affect by arbitrary regulation. And if by a regulation concurrently adopted by all nations, the coins of each were uniformly either debased or enhanced in value without a corresponding change of their intrinsic value, the change would be immediately followed by an equal advance or decline in the price of property. If the change were made in the value of the coins of one country only, it would be at once succeeded by a fluctuation in prices of property measured by it, showing that their purchasing power had undergone no essential modification; and the same conclusion would result from a comparison of the value of such coins with the coined

for relief on the ground of mistake against that obligation and the judgment founded upon it. Judge Owsley said: "When the original obligation . . . was made the legislature of Virginia had the power to regulate the currency of their coin within the limits of that state; and as the contract . . . was made within the limits of that state, the promise . . . to pay in current money of Virginia must have been agreed on with a knowledge of the state sovereignty, and subject to its control in regulating the currency. We are of the opinion, therefore, that the original obligation . . . might have been satisfied by payment in current money at its value when Lyne became entitled to demand payment;" and that relief was granted against the judgment.

<sup>1</sup> *Du Costa v. Cole*, Skin. 272; *Chitty*

on Bills, \*399. See Anonymous, 1 Hayw. (by Batt.) 354.

A will speaks from the time of the testator's death, and a legacy of a certain number of dollars is payable in such dollars as were then standard. *Graveley v. Graveley*, 25 S. C. 1, 60, Am. Rep. 478.

If at the time a contract which provides for its discharge in lawful silver money is made silver coins of all denominations are legal tender, the fact that subsequently such coins are a legal tender for only a small proportion of the amount due does not prevent the payment of the obligation in the manner stipulated. *Parish v. Kohler*, 11 Phila. 346.

Damages are assessable in the same kind of money as the contract calls for. *Martin v. Evans*, 14 Phila. 122.

<sup>2</sup> See Story Conf. Laws, § 313b.

money of other nations. When a contract is made for the payment at a future day of a given amount of money in specified legal denominations, having at the date of the contract a fixed legal value, are not the intention and legal obligation of the parties to be ascertained by the import at that time of the terms used? Undoubtedly a debt created by contract which can be paid with money can be satisfied by whatever medium of payment is legal tender at the time it is due and payable,<sup>1</sup> if paid then; and it may be added, that at all times afterwards it will be solvable in any money which for the time being is legal tender at the place where payment may be demanded or tendered, whether it be the place of contract or elsewhere.<sup>2</sup>

The legal currency which may be applicable at the place of contract when the debt becomes due and is actually demanded, or sought by tender to be paid, may be as unlike that [326] mentioned in the contract as though the demand of payment or tender were made in another country. Upon general principles and legal analogies the value should be ascertained by the legal reading of the contract at the time it was made, and this is payable in any currency which is legal tender when payment is actually made.<sup>3</sup> If when and where payment is made the currency consists of coins of the same or a different name, and represent different values from those named in the contract, or the same values, but have been either debased or the contrary, the par should be ascertained of the money of the contract, and that par should be the measure of the amount due. This question may be precluded by the new currency, or that which is offered in payment being made a lawful tender for the particular debt at the nominal value of such currency. Under such legislation, these general views have but a subordinate influence; the practical question then being what is the effect of the statute.

**§ 210. The legal tender act.** Under the legal tender law of 1862 the value of the dollar was not changed, but a new legal representative of it was introduced as a medium of payment. Paper money in the form of the government's promise to pay was issued and declared to be legal tender for all debts, pub-

<sup>1</sup> Higgins v. Bear River & A. Water & M. Co., 27 Cal. 153; Wilson v. Morgan, 4 Robert. 58.

<sup>2</sup> Downman v. Downman, 1 Wash. (Va.) 26.

<sup>3</sup> Bronson v. Rodes, 7 Wall. 229.

lic and private, with certain exceptions of the former. The coinage, which had previously been the exclusive legal tender, was, however, still retained as money. During the first years after the issue of this paper currency, owing to the situation of the country, and doubtless to the circumstance that no time was fixed for its redemption in specie, it became depreciated; that is, gold and silver money was largely at a premium. As greenbacks were a legal tender for all debts payable in money generally they became, of course, the ordinary currency, and were thereby made the legal, as they were the nominal, equivalent, dollar for dollar, for the payment not only of all subsequent but also all antecedent debts.<sup>1</sup> The difference in market value could not be recognized when the paper dollar was offered in payment of any debts to which it was applicable by law. The court said: "A court cannot say judicially that one kind of money made a legal tender is of greater or less value than another; nor can evidence be received to prove a difference."<sup>2</sup> The legal equivalence in value of coined money and greenbacks is more absolutely asserted by the early than by the later decisions.<sup>3</sup> In an action for specific performance

<sup>1</sup> Legal Tender Cases, 12 Wall. 457; *Dooley v. Smith*, 13 id. 604; *Bigler v. Waller*, 14 id. 297; *Bowen v. Clark*, 46 Ind. 405; *Reynolds v. Bank, etc.*, 18 id. 467; *Thayer v. Hedges*, 23 id. 141; *Brown v. Welch*, 26 id. 116; *Bank v. Burton*, 27 id. 426; *McInhill v. Odell*, 62 Ill. 169; *Black v. Lusk*, 69 id. 70; *Morrow v. Rainey*, 58 id. 357; *Chamblin v. Blair*, id. 385; *Longworth v. Mitchell*, 26 Ohio St. 334; *Belloc v. Davis*, 38 Cal. 243.

<sup>2</sup> *Carpentier v. Atherton*, 25 Cal. 564; *Reese v. Stearns*, 29 id. 273; *Spencer v. Prindle*, 28 id. 276; *Poett v. Stearnes*, 31 id. 78.

<sup>3</sup> In *Buchegger v. Shultz*, 13 Mich. 420 (1865), it was held that the act of congress making treasury notes a legal tender in payment of private debts was not designed to confer a personal privilege upon debtors, but was based upon principles of state policy; and an agreement between

parties waiving its provisions, and requiring a debt to be paid in gold, is illegal, and cannot be sustained. See *Linn v. Minor*, 4 Nev. 462 (1868).

In *Kimpton v. Bronson*, 45 Barb. 618, *Daniels, J.*, said: "The law has impressed them (treasury notes) with a legal value precisely equal to that of gold and silver of the same denominations for the purpose of paying individual debts with them, and it cannot permit a discrimination against them in favor of gold and silver, without allowing its authority to be substantially annulled. However the fact may be as to their value as a mere commodity, for the purpose of paying individual debts a treasury note is as completely a legal dollar as a piece of metal of a certain weight and quality, impressed as the law directs, is a legal dollar. The one is no more so than the other for those purposes that the

the plaintiff had a verdict; and in September, 1860, deposited the purchase-money in court in gold to be taken out by the defendant on filing his deed. The prothonotary deposited the money with reliable bankers to his own credit. They employed the money as they did other deposits, without profit as coin; it was always subject to the prothonotary's draft. The defendant filed his deed after the passage of the legal-tender law, and the prothonotary offered to pay him the money in court in legal tenders, which he refused and brought [328] trover for the gold; held, that he could not recover.<sup>1</sup>

The earlier cases proceeded on the construction that "*all debts*" in the legal tender law of 1862 included all pecuniary liabilities, whether originating in contracts expressly to pay in gold and silver, or in "dollars" generally. But the subject received a different treatment when it came to be considered in the national supreme court. That court said congress must have had in contemplation debts originating in contract, or demands carried into judgment, and only debts of this character. And the term did not include taxes levied under state laws;<sup>2</sup> nor obligations payable expressly in coined money. Referring to a tender of United States notes in 1865 on a debt contracted in 1851, payable by the language of the contract in gold and silver coin, Chase, C. J., said there were two descriptions of money in use at the time the tender was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were

laws have declared them to be of equal value. Where these laws are supreme, that value must be observed and secured by courts of justice. If the obligation in this case had been such as required the delivery of one thousand eight hundred gold dollars, and not as it was, one thousand eight hundred dollars in gold or silver coin, its construction must have been different. Further, it would have been in no sense a debt within the contemplation of these statutes, and could not be affected by their provisions declaring treasury notes a lawful tender for the payment of debts." Such was the

general current of decisions; namely, that all debts, whether payable in terms in gold and silver as money, or in dollars generally, were solvable in greenbacks. *Shollenberger v. Brinton*, 52 Pa. 1; *Appel v. Woltmann*, 38 Mo. 194; *Riddlesbarger v. McDaniel*, id. 138; *Wilson v. Morgan*, 4 Robert. 58, 1 Abb. Pr. (N. S.) 174, 30 How. Pr. 386; *Murray v. Gale*, 5 Abb. Pr. (N. S.) 236, 52 Barb. 427; *Whetstone v. Colley*, 36 Ill. 328; *Humphrey v. Clement*, 44 Ill. 299; *Galliano v. Pierre*, 18 La. Ann. 10, 89 Am. Dec. 643; *Munter v. Rogers*, 50 Ala. 283.

<sup>1</sup> *Aurentz v. Porter*, 56 Pa. 115.

<sup>2</sup> *Lane County v. Oregon*, 7 Wall. 71.

essentially unlike in nature. The coined dollar was a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand, nor at any fixed time, nor was it in fact convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be actual equivalents of each other, nor was there anything in the currency acts purporting to make them such.<sup>1</sup>

<sup>1</sup> *Bronson v. Rodes*, 7 Wall. 229; *Legal Tender Cases*, 12 Wall. 457.

In *The Vaughan and Telegraph*, 14 Wall. 258, which was a collision case, there was a right to recover for the loss of property according to its value at the time and place of shipment. The place of shipment being in Canada, the value in dollars was stated in the currency of Canada, which was equivalent to the gold currency of the United States, but being stated in dollars, the district court refused to recognize any difference between the value of a dollar of that currency and the dollar of the currency in which the judgment of the court would be payable; in other words, would allow nothing to be added to the amount stated in the dollars of Canada currency, to give the equivalent when paid in legal tender notes — holding that the loss in this way was an incident of the suit in the forum where it was brought, and was unavoidable. In the circuit court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. "These notes," said Swayne, J., "have since largely appreciated, so that while the libelants would, under the decree of the district court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the circuit court be affirmed, receive much more. . . . Upon the rule of damages applied by both courts as re-

spects the kind of currency in which the value of the barley was estimated, the libelants were entitled, on the plainest principles of justice, to be paid in specie or its equivalent. The hardship arising from the decree before us is due entirely to the delay in its payment which has since occurred, and the change which time and circumstances have wrought in the value of the legal tender currency. The decree was right when rendered, and being so, cannot now be disturbed." A minority of the court dissented, on the ground that the original decree should have been rendered for the Canada value in gold to avoid the loss incident to the fluctuations in the value of greenbacks. See *Edmondson v. Hyde*, 2 Sawyer, 205; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333.

In *Simpkins v. Low*, 54 N. Y. 179, it was held that the legal tender acts of congress relate to the effect of the notes issued thereunder as a tender in the payment of debts arising on contract; they do not forbid the recognition in other relations of the difference between coin and currency. The action was brought for the conversion of certain bonds issued by a California company, and though not in terms payable in gold, still as they were by the custom of business treated as such, recovery was permitted on a gold basis.

In *Luling v. Atlantic Mut. Ins. Co.*, 30 How. Pr. 69, it was held that where there is a specific agreement made



Except for the payment of debts, in the sense of [329-333] the legal tender law, there was no conclusive presumption that the two currencies were of equal value. Parties may by their contracts recognize not only the actual, but any estimated, dif-

between any *policy-holders* of a mutual insurance company and the *company* that the premiums of the former shall be paid in *gold* and the losses shall be paid by, the latter in *gold*, the company on declaring its *dividends* are bound to allow such policy-holders a certificate of their share of the profits in accordance with a *gold standard* as compared with currency. A *notice* issued by the company to the effect that the dealers making insurances payable in gold were to participate with others in the earnings, and that these would be computed and made payable in *currency*, and the delivery by the company and acceptance of the certificates of such earnings by such policy-holders under said notice does not affect the legal bearing of the contract, nor make the certificates a bar to an action by the policy-holders against the company to correct the account upon which these were based and for a proper readjustment. The certificates were good to the extent which they provided for only. *Baltimore & O. R. Co. v. State*, 36 Md. 519; *Bank of Prince Edward Island v. Turnbull*, 35 How. Pr. 8; *Lane v. Gluckauf*, 28 Cal. 288; *Vilhac v. Biven*, id. 410; *Rankin v. Demott*, 61 Pa. 263.

A debt payable "in gold or its equivalent in lawful money of the U. S." requires payment to be made at the commercial value of gold when due. *Baker's Appeal*, 59 Pa. 313. The defendants in 1866 bought goods from plaintiffs, "Liverpool tests, monthly shipments from Liverpool to Philadelphia, . . . at three and one-fourth cents per pound, cash, gold coin, on vessel at Philadel-

phia;" held to be payable in gold or its equivalent. Parties could take themselves out of the operation of the legal tender law after its passage by contracting for payment in coin alone. *Frank v. Colhoun*, 59 Pa. 381. See *Governor, Opinion in Response to*, 49 Mo. 216; *The Emily B. Souder*, 8 Blatchf. 337.

In *Glass v. Abbott*, 6 Bush, 622, it was held that the difference in value between gold and greenbacks is sufficient to make usury, where there would be none if no such difference existed. But see *Reinback v. Crabtree*, 77 Ill. 182.

Money had and received maintainable for proceeds of a gold bond sold, and recovery may be had of such proceeds at its value in paper money. *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

In *Carpenter v. Atherton*, 28 How. Pr. 303, a California contract payable in gold was in question; being such as under the statutes of that state, called the specific contract act, would be there enforced by requiring payment in gold, it was held proper to decree in New York that it be specifically performed, and a tender of greenbacks was held no defense. This remedy was afforded while the courts of the latter state held that legal tender notes were applicable to debts payable expressly in coined money. But in Massachusetts the courts held that the benefits of the California specific contract act could not be allowed. *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407.

In *Cooke v. Davis*, 53 N. Y. 318, it was held that a contract to deliver or receive either of the two recog-

ference, incur obligations on the basis of it as a consideration;<sup>1</sup> obtain damages for torts in respect to it, or recover for the loss of it as an element of damage;<sup>2</sup> and by that standard where there have been dealings on a gold basis resulting in an indebtedness,<sup>3</sup> or an indebtedness payable in a foreign coin currency.<sup>4</sup> And to insure the full benefit of the gold value of the debt or liability, judgment in coined money is authorized and required to be rendered.<sup>5</sup>

**§ 211. Effect of fluctuations in currency.** Where there are fluctuations in the value of the money of account, or of the currency in which the commercial business of a country is

nized kinds of currency at a price expressed in dollars and fractions of a dollar, or at a specified percentage, is to be construed as meaning that the price is payable in the other currency. The defendant contracted to deliver to the plaintiff's assignor "\$10,000 current funds of the United States" at fifteen cents on the dollar ten months after date. It was held that the contract was to deliver \$10,000 legal tender notes for \$1,500 in coin; that it was valid, and for a breach thereof the defendant was liable. The contract was so construed, because otherwise it would be meaningless. The court below construed the promise of fifteen per cent. as payable also in legal tenders, and nonsuited the plaintiff on the ground that the contract was void for want of consideration. See *Smith v. McKinney*, 22 Ohio St. 200; also, *Caldwell v. Craig*, 22 Gratt. 340; *Turpin v. Sledd's Ex'r*, 23 id. 238.

The subject of the comparative value of treasury notes and coin is discussed in a practical way by Beatty, C. J., in *State v. Knittschnecht*, 4 Nev. 178 (1868). See *Fabbri v. Kalbfleisch*, 52 N. Y. 28; *Kupfer v. Bank of Galena*, 34 Ill. 328, 85 Am. Dec. 309; *Trebilcock v. Wilson*, 12 Wall. 687; *People v. Cook*, 44 Cal. 638.

<sup>1</sup>*Cooke v. Davis*, 53 N. Y. 318;

*Smith v. McKinney*, 22 Ohio St. 200; *Luling v. Atlantic Mut. Ins. Co.*, 30 How. Pr. 69.

<sup>2</sup>*Simpkins v. Low*, 54 N. Y. 179; *Kellogg v. Sweeney*, 46 id. 291, 7 Am. Rep. 333; *The Vaughan and Telegraph*, 14 Wall. 258; *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

<sup>3</sup>*Hancock v. Franklin Ins. Co.*, 114 Mass. 155. But see *Wright v. Jacobs*, 61 Mo. 19.

<sup>4</sup>*Christ Church Hospital v. Fuechsel*, 54 Pa. 71; *Mather v. Kinike*, 51 id. 425; *The Emily B. Souder*, 8 Blatchf. 337, 17 Wall. 666; *Sheehan v. Dalrymple*, 19 Mich. 239; *Colton v. Dunham*, 2 Paige, 267; *Black v. Ward*, 27 Mich. 191; *Oliver v. Shoemaker*, 35 Mich. 464.

<sup>5</sup>*Bronson v. Rodes*, 7 Wall. 229; *The Emily B. Souder*, 17 id. 666; *Trebilcock v. Wilson*, 12 id. 687; *Dewing v. Sears*, 11 id. 379; *Quinn v. Lloyd*, 1 Sweeny, 253; *Currier v. Davis*, 111 Mass. 480; *Independent Ins. Co. v. Thomas*, 104 id. 192; *Chisholm v. Arrington*, 43 Ala. 610; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Chesapeake Bank v. Swain*, 29 Md. 483; *Atkinson v. Clark*, 69 Ga. 460. See *Gist v. Alexander*, 15 Rich. 50; *Townsend v. Jennison*, 44 Vt. 315; *Grund v. Pendergast*, 58 Barb. 216.

transacted, allowances have sometimes been made. These fluctuations have been very great, and are always liable to occur when the currency is paper. A promisor has a right to pay in the currency of the contract at par, although [334] depreciated, if he pays when it is due; but if he does not, and that currency is money, is the subsequent depreciation an item of legal damages to the creditor; or if it subsequently appreciates, is the increase of value an item for which allowance can be made against him? In an early case in North Carolina the court say: "Where the currency in which the judgment is to be given is equal, sum for sum to the money mentioned in the bond, the jury assess damages usually for the detention to the amount of the interest accrued, but they are not obliged to assess damages to that amount only. If upon inquiry, for instance, they find that one pound of the present currency of this country is not equal to one pound of the money payable by the obligation, whether this inequality be occasioned by depreciation or any other cause, and though the money mentioned in the obligation be not foreign money, they may, in the assessment of damages, increase them beyond the amount of the interest so as to make the damages and principal equal in value to the principal and interest mentioned in the bond."<sup>1</sup> But whatever may be the rule in respect to a mere conventional money, a debt or liability payable in a legal tender currency may always be discharged in that currency at par, and no allowance is made for fluctuations in its value.<sup>2</sup>

More than once in the history of this country there has been a conventional and fluctuating paper currency in general use as a substitute for and purporting to represent the denominations

<sup>1</sup> Anonymous, 1 Hayw. (by Batt.) 354. In a note to this case it is stated that there were at the same term several cases of *assumpsit* for currency more depreciated at the time of the contract than it is now, and according to the direction of the court the plaintiff recovered only the real value in the present currency, the sum demanded being reduced one-sixth,—twelve shillings having been equal to one dollar when

the contract was made, and one dollar now being equal to ten shillings. See *Taliaferro v. Minor*, 1 Call, 456; *Massachusetts Hospital v. Provincial Ins. Co.*, 25 Up. Can. Q. B. 613.

<sup>2</sup> See *Faw v. Marsteller*, 2 Cranch, 10, 29; *Downman v. Downman*, 1 Wash. (Va.) 26; *Higgins v. Bear River & A. Water & M. Co.*, 27 Cal. 153; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400.

of an otherwise ideal legal money. During the prevalence of such currency values have been estimated and dealt with as though this depreciated money were their legal standard and measure. Questions of amount have arisen out of such trans-[335] actions after this vicious currency had passed away, and sums agreed to be paid while it was the general medium of exchange, and magnified in consequence of its depreciation, have been demanded when payment could be exacted in the pure, legal currency. Scaling laws have then been enacted as the only relief against the injustice and inequality of interpreting the inflated language of value which a depreciated currency had popularized by the actual legal standard subsequently brought into practical use. This mode of relief was resorted to in the late insurgent states after the rebellion where the notes of the confederacy had necessarily been the only circulating medium; and until the subject was considered in the supreme court of the United States scaling acts were, by the decisions of several of the state courts, regarded as essential to protect debtors from the enforcement of contracts made with reference to the depreciated currency from liability to pay an equal sum in the lawful currency of the United States.<sup>1</sup>

<sup>1</sup>In *Omohundro v. Crump*, 18 Gratt. 703, Jaynes, J., said, in respect to notes made in Virginia in November, 1861, payable in one, two and three years: "The act of March 3, 1866, provides that in any action founded on any contract, express or implied, made and entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show by parol or other relevant evidence what was the true understanding and agreement of the parties, either expressed or to be implied, as to the kind of currency in which it was to be fulfilled or performed, or in reference to which as a standard of value it was made and entered into. This case does not come within the provisions of that act, because the note was made before the 1st day of January, 1862. It is doubtful, to

say the least, whether parol evidence of the actual understanding and agreement of the parties as to the kind of currency in which a contract is to be fulfilled, which is expressed to be payable in 'dollars' generally, would be admissible, independently of the provisions of that act. The word 'dollars' has a definite signification fixed by law, and it is laid down that 'when the words have a known legal meaning, such for example as measures of quantity fixed by statute, parol evidence that the parties intended to use them in a sense different from their meaning, though it was still the customary and popular meaning, is not admissible.' 1 Greenleaf Ev., § 280. See also *Smith v. Walker*, 1 Call, 24; *Commonwealth v. Beaumarchais*, 3 Call, 107. We need not decide whether such evidence could

In 1868 a case from Alabama brought this subject [336] before the federal court of last resort. The question was, "Whether evidence can be received to prove that a promise, made in one of the insurgent states, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States?" "It is quite clear," said Chase, C. J., delivering the opinion of the court, "that a contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that

have been received in this case, because it is expressly stated in the facts agreed that there was no actual agreement.

"It is contended, however, that the law will imply an agreement under the circumstances of this case to accept confederate money in payment of the note on which the action is founded. The argument is that the note, having been made after the establishment of the confederate states, must be considered as made with reference to the actual currency of those states; and that as confederate notes were the actual currency in those states at the time the note became payable it was payable in that currency. It must be remembered, however, that confederate notes were never made a legal tender. They were never the lawful money of the country, but only a substitute for money like bank notes. Gold and silver were the lawful money of the confederate states at the time this note was made, and also at the time it became payable, according to the provisions of the act

of the congress of the United States, expressly adopted by the congress of the confederate states. The principle of public law relied on by the counsel for the appellant, and quoted from Story, Conf., § 242, presumes, in the absence of evidence to the contrary, that every contract is made with reference to the lawful currency of the country in which it is entered into. It does not presume it to be made with reference to any substitute for any currency which may happen to circulate. A contract made in Richmond before the war for the payment of so many dollars would not have been deemed payable in bank notes, though bank notes were then the common and practically the exclusive currency. And so in this case, if we apply to the confederate states the principle relied on, the note must be deemed payable in specie, which was the lawful money of the confederate states at the time it became payable." *Boulware v. Newton*, 18 Gratt. 708; *Hansbrough v. Utz*, 75 Va. 959.

country, evidence would be admitted to prove what kind of dollars were intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful [337] money of the United States. Such evidence does not alter or modify the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence. We have already seen that the people in the insurgent states, under the confederate government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and as, in the former case, the people would be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power. It is said, indeed, that under the insurgent government the word 'dollar' had the same meaning as under the government of the United States; that the confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent states was matter of fact rather than matter of law, and as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this gave them a sort of value, insignificant and precarious enough, it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was

always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts, it seems hardly less than absurd to say that these dollars must be regarded as identical in kind [338] and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the circumstances, to admit proof of the sense in which the word 'dollar' is used in the contract before us."<sup>1</sup>

The presumption from the promise to pay dollars was [339] that dollars of lawful money were meant.<sup>2</sup> But this presumption was reversed by the provisions of the scaling laws enacted in some states. Payments actually received by the creditor in confederate notes were held valid.<sup>3</sup> But it was held in some of the southern states that payments received by an agent or trustee in such currency would not have effect as such.<sup>4</sup> In Tennessee, North Carolina and Georgia, however, it was held that a sheriff is authorized to receive, in the absence of instructions to the contrary, whatever kind of money is passing currently in the payment of debts of the same character as that

<sup>1</sup> *Thorington v. Smith*, 8 Wall. 1. See *Hanauer v. Woodruff*, 15 id. 448; *Confederate Note Case*, 19 id. 548; *Gavinzel v. Crump*, 22 id. 308; *Effinger v. Kenney*, 115 U. S. 566, 9 Sup. Ct. Rep. 179, and cases cited; *Bailey v. Stroud*, 26 W. Va. 614; *Chalmers v. Jones*, 23 S. C. 463.

If payment is made in a depreciated currency which is not legal tender a promise to make good the depreciation is founded on a valuable consideration; but it is otherwise where payment is made in what the law designates as money. *McElderry v. Jones*, 67 Ala. 203.

<sup>2</sup> *Id.*; *Wilcoxon v. Reynolds*, 46 Ala. 529; *Taunton v. McInnish*, id. 619; *Neeley v. McFadden*, 2 S. C. 169; *Williamson v. Smith*, 1 Cold. 1, 78 Am. Dec. 478.

<sup>3</sup> *Ponder v. Scott*, 44 Ala. 241.

<sup>4</sup> *Scruggs v. Luster*, 1 Heisk. 150;

*Whitley v. Moseley*, 46 Ala. 480. See *Williams v. Campbell*, 46 Miss. 57; *Powell v. Knighton*, 43 Ala. 626; *Fretz v. Stover*, 22 Wall. 198; also *Robinson v. International L. Assur. Society, etc.*, 42 N. Y. 54, 1 Am. Rep. 490; *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457; *Alley v. Rogers*, 19 id. 366.

Executors or administrators and other trustees who were clothed with the legal title to claims due the estates they represented discharged debtors thereto by receiving payment in confederate currency in the absence of fraud or collusion. *Trustees of Howard College v. Turner*, 71 Ala. 429, and cases cited; *Hyatt v. McBurney*, 18 S. C. 199. But it was not so in the case of one whose authority was special, as an agent or attorney. *Ferguson v. Morris*, 67 Ala. 389. See next note.

which he has to collect, subject to the limitation that he would not be warranted in receiving any currency so depreciated as to amount to notice that the creditor would not accept it.<sup>1</sup>

## SECTION 2.

### PAR AND RATE OF EXCHANGE.

§ 212. **Par of exchange.** There is no common or international unit of value; hence the business and commerce of the world are conducted in many kinds of money. It often becomes necessary, therefore, to enforce the collection of debts incurred or

<sup>1</sup> *Atkin v. Mooney*, Phil. (N. C. L.) 32; *Emerson v. Mallett*, Phil. Eq. 236; *Turner v. Collier*, 4 Heisk. 89; *Boyd v. Sales*, 39 Ga. 74; *King v. King*, 37 id. 205; *Campbell v. Miller*, 38 id. 304, 95 Am. Dec. 389; *Hutchins v. Hullman*, 34 Ga. 346; *Neely v. Woodward*, 7 Heisk. 495. See *Van Vacter v. Brewster*, 1 Sm. & M. 490.

"No court since the war has held, so far as we know, that confederate treasury notes were issued by lawful authority; but money has been recognized generally by the courts as a generic term, covering anything that by common consent is made to represent property and pass as such in current business transactions, and that when a judgment or debt has been paid in confederate money and accepted, the transaction cannot be opened. Several decisions go to the extent that if at the time and place of payment confederate money was generally received in business transactions and was in fact the current money of the country, the agent's authority to receive such money, in the absence of directions to the contrary, may be presumed. This rule has been applied not only when the creditor and debtor were within the same state, but when the creditor resided in a state not a member of the confederacy, and the debtor was within the confederate lines. *King*

*v. King*, 37 Ga. 205; *Westbrook v. Davis*, 48 Ga. 471; *Rodgers v. Bass*, 46 Tex. 505; *Burford v. Memphis Bulletin Co.*, 9 Heisk. 691; *Pidgeon v. Williams*, 21 Gratt. 251; *Hale v. Wall*, 22 Gratt. 224; *Robinson v. International L. Assur. Society*, 42 N. Y. 54, 1 Am. Rep. 490; *Glasgow v. Lipse*, 117 U. S. 327, 6 Sup. Ct. Rep. 757; *Martin's Adm'r v. United States*, 2 T. B. Mon. 89, 15 Am. Dec. 129. Other decisions hold that the rule should not be applied where the creditor was within the federal lines, with communication between him and his agent in the confederacy destroyed. In such a case it has been held that no implied authority to receive confederate money existed, and that payment to the agent or attorney did not discharge the debt. *Harper v. Harvey*, 4 W. Va. 539; *Alley v. Rogers*, 19 Gratt. 366; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Fretz v. Stover*, 22 Wall. 198." *Hendry v. Benlisa*, 37 Fla. 609, 20 So. Rep. 800, 34 L. R. A. 283. The last case holds that if at the time and place of payment in confederate money it was generally received in business transactions, and was the current money of the country, an agent's authority to receive it, in the absence of directions to the contrary from a resident principal, will be presumed.



contracted in one currency by resort to courts whose judgments are rendered in another; and the gold and silver coins of one country often circulate as money in other countries and are current at their value, which is capable of equivalent expression in the local currency. [340] Whatever the coinage, a like amount of these precious metals will, in all forms of coined money, be of like intrinsic value, depending for its equality on weight and fineness. An amount stated in one currency which is an equivalent for the same value expressed in another is the par of exchange; it is a literal translation of the language of value in one country or currency into that of equal value in another. The true par of exchange between two countries is the equivalent of a certain amount of the currency of one in the currency of the other, supposing the currency of both to be at the precise weight and purity fixed by their respective mints;<sup>1</sup> or in other words, it is the amount which the standard coin of either country would produce when coined at the mint of the other.<sup>2</sup>

<sup>1</sup> McCulloch's Com. Dic., tit. Par of Exchange.

<sup>2</sup> Commonwealth v. Haupt, 10 Allen, 38. In Daniel on Negotiable Instruments the par of exchange is thus explained, vol. 2, §§ 1442, 1443: "By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins as fixed by the mint standard of the respective countries. Cunningham on Bills, 417; Story on Bills, § 30. Marius says: '*Pair*,' as the French call it, 'is to equalize, match or make even the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in another kind of money in another place, without having respect to the current of exchange for the same, but only to what the moneys

are worth.' Marius on Bills, 4. It is necessary to this purpose to ascertain the intrinsic values of the different coins; and then it is a matter of arithmetical computation to arrive at the amount of one which will be the exact equivalent of a certain amount of the other, into which it is to be exchanged. When this has been accomplished, and the exact equivalent of a certain amount in one currency has been ascertained in another, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between the amounts at different places. Gilbert remarks on this subject, in his Treatise on Banking: 'The real par of exchange

[341] The par of exchange is the measure of damages only when the sum for which it is substituted as an equivalent would be such if judgment could be taken in the same currency as that in which the debt exists. It is the measure where there is no question of the rate of exchange, and the only inquiry is what is the equivalent amount in our currency to that found due in a foreign currency.

The nominal par based on the equality in value of gold or silver, whether in foreign or domestic coins, by the universal standard, may not be the real par if the money of the former be not gold and silver of the standard value, or if it be some depreciated substitute. Then it may be a question whether the creditor is entitled to judgment for an equivalent according to the real par, or whether he must accept as an equivalent the nominal par. Judge Story says, "if a note were made in England for £100 sterling, payable in Boston, if a suit

between two countries is that by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3 17s. 10 $\frac{1}{2}$ d. per ounce. In France, silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually it bears a premium or *agio*.' In the above quotation the premium is stated to be 7 per *mille*; that is, it would require 1,007 francs in silver to purchase 1,000 francs in gold. At this price the natural exchange, or that at which an ounce of gold in England would purchase an ounce of gold in France, is 25.31 $\frac{1}{2}$ . But the commercial exchange—that is, the price at which bills on London would sell on the Paris exchange—is 25 francs, 25 cents, showing that gold is 0.80 per cent. dearer in Paris than in London. Tables have been constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam (Gilbert on Banking, 424). And in Cunningham

on Bills it is said: By the par of exchange is meant the precise equality between any sum or quantity of English money, and the money of a foreign country into which it is to be exchanged, regard being had to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint he made, by order of council, assays of a great number of foreign coins to know their intrinsic values and to calculate thereby the par of exchange between England and other countries, of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Dutot, in a late book, entitled, *Reflections Politiques sur les Finances*, to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer." Gilbert on Banking, 417.

were brought in Massachusetts, the party would be entitled to recover . . . the established par of exchange by [342] our laws. But if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for, so as to bring the sum to the real par, instead of the nominal par."<sup>1</sup> And for the same reason, if the money in which the debt was incurred were depreciated, an allowance by way of deduction should be made in ascertaining the equivalent in a currency of gold and silver of standard value. There being no statute fixing for general purposes a legal par of exchange, the rule which is established by the best authorities is that in rendering judgment in a different currency it should be given for such sum as approximates most nearly to the value of the amount contracted for.<sup>2</sup>

**§ 213. Rate of exchange.** Where the debt is not only payable in the currency of a foreign country, but is expressly or by implication also payable there, and not having been paid is sued in this country, the creditor is entitled to the money of the forum to a sum equal to the value of the debt at the place where it should have been paid. Where the creditor sues the law ought to give him just as much as he would have had if the contract had been performed, just what he must pay to remit the amount of the debt to the country where it was payable. Hence he is entitled to recover according to the rate of exchange between the two countries at the time of the trial.<sup>3</sup>

<sup>1</sup> Story's Conf. Laws, § 310.

<sup>2</sup> *Benners v. Clemens*, 58 Pa. 24; *Robinson v. Hall*, 28 How. Pr. 342; *Pollock v. Colglazure*, Sneed, 2; *Comstock v. Smith*, 20 Mich. 338; *Reiser v. Parker*, 1 Lowell, 262; *Hawes v. Woolcock*, 26 Wis. 629; *Jelison v. Lee*, 3 Woodb. & M. 368; *Cary v. Courtenay*, 103 Mass. 316, 4 Am. Rep. 559; *Swanson v. Cooke*, 30 How. Pr. 385, 45 Barb. 574; 3 Kent's Com. 116, note; *The Vaughan and Telegraph*, 14 Wall. 258; *Story's Conf. Laws*, §§ 310, 311; *Scott v. Bevan*, 2 B. & Ad. 78.

<sup>3</sup> *Marburg v. Marburg*, 26 Md. 8, 90

*Am. Dec.* 84; *Watson v. Brewster*, 1 Pa. 381; *Hawes v. Woolcock*, 26 Wis. 629; *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417; *Jelison v. Lee*, 3 Woodb. & M. 368; *Nickerson v. Soesman*, 98 Mass. 364; *Capron v. Adams*, 28 Md. 529; *Cushing v. Wells*, 98 Mass. 550; *Smith v. Shaw*, 2 Wash. C. C. 167; *Stringer v. Coombs*, 62 Me. 160, 16 Am. Rep. 414; *Grant v. Healey*, 3 Sumn. 523; *Benners v. Clemens*, 58 Pa. 24; *Woodhull v. Wagner*, 1 Bald. 296; *Wood v. Watson*, 53 Me. 300; *Delegal v. Naylor*, 7 Bing. 460; *Cash v. Kennion*, 11 Ves. 314; *Lee v. Wilcocks*, 5 S. & R. 48;

Scott v. Bevan, 2 B. & Ad. 78, and note; Ekins v. East India Co., 1 P. Wms. 395; Lanusse v. Barker, 3 Wheat. 101.

[343] The opinion in *Grant v. Healey*, *supra*, places the law on this subject in a clear light, and answers with great force the contrary decisions in Massachusetts and New York which are cited in the discussion. "I take the general doctrine to be clear," said the learned judge, "that whenever a debt is made payable in one country, and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then and then only is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between these countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and of advances, the object is to ascertain where, according to the intention of the parties, the balance is to be repaid — in the country of the creditor or of the debtor. In *Lanusse v. Baker*, 3 Wheat. 101, 147, the supreme court of the United States seem to have thought that where money is advanced for a person in another state, the implied undertaking is to replace it in the country where it is advanced, unless

that conclusion is repelled by the agreement of the parties or by other controlling circumstances. . . .

In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining where the balance is reimbursable, whether where the creditor resides or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application is that advances ought to be deemed reimbursable at the place where they are made, and sales of goods accounted for at the place where they are made or authorized to be made. . . . (*Consequa v. Fanning*, 3 Johns. Ch. 587, 610, 17 Johns. 511, 8 Am. Dec. 442.) . . . I am aware that a different rule, in respect to balances of account and debts due and payable in a foreign country, was laid down in *Martin v. Franklin*, 4 Johns. 125, and *Scofield v. Day*, 20 Johns. 102, and that it has been followed by the supreme court of Massachusetts in *Adams v. Cordis*, 8 Pick. 260. It is with unaffected diffidence that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning in the 4 Johns. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the disposition which the creditor may make of his debt after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another

[344] country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of his contract has occasioned the loss. The loss of which we here speak is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows that the very sum of money paid in one country is not an indemnity or equivalent for it when paid in another country, to which by the default of the debtor the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China, and violates his contract, and then he is sued therefor in Boston, when the money if duly paid in China would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at par in Boston? Indeed I do not perceive any just foundation for the rule that interest is payable according to the law of the place where the contract is to be performed, except it be the very same on which a like claim may be made as to the principal, viz., that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation as if he had punctually complied with his contract there. It is suggested that the case of bills of exchange stands upon a distinct ground, that of usage, and

is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain what should be the rate of damages for a violation of the contract generally, a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard dependent upon the daily rates of exchange; exactly for the same reason that the rule of deducting one-third new for old is applied to cases of repairs of ships, and the deduction of one-third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries where no such fixed rate of damages exists, the doctrine of damages applied to the contract is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. That is sufficiently clear from the case of *Mellish v. Simeon*, 2 H. Black. 378, and the whole theory of re-exchange." See *Lodge v. Spooner*, 8 Gray, 166; *Hussey v. Farlow*, 9 Allen, 263; *Bush v. Baldrey*, 11 id. 367; *Weed v. Miller*, 1 McLean, 423; *Grutacup v. Woul-luise*, 2 id. 581.

## CHAPTER VII.

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## SECTION 1.

### PAYMENT.

[345] § 214. What is; modes of making. Payment is the actual performance of an agreement or duty to pay money.<sup>1</sup> It is distinguishable from accord and satisfaction, and from release; it is strict performance in respect to a debt, according to the literal and substantial import of the contract by virtue of which it was incurred; accord and satisfaction is the adoption, by mutual consent and the doing, of some other act as a substitute; release is a renunciation of the contract or liability, whereby performance is waived. But accord and satisfaction is a payment *sub modo*; and a release, as it must be founded on an actual consideration, shown or implied, is to the extent of such consideration a payment or satisfaction.<sup>2</sup>

Payment includes the transfer by the debtor to the creditor and the receipt by the latter of money or something else of value accepted by him as representing money. Ordinarily

<sup>1</sup> City Savings Bank v. Stevens, 59 N. Y. Super. Ct. 549, 15 N. Y. Supp. 139.

A payment on Sunday discharges the debt. Jameson v. Carpenter, 68 N. H. 62, 36 Atl. Rep. 554.

Under an agreement to pay bills daily for goods delivered the purchaser has the whole of the day in which bills are presented to pay them. Anglo-American Provision Co. v. Prentiss, 157 Ill. 506, 42 N. E. Rep. 157.

Punctual payment means payment on the day fixed; nine days thereafter is too late. Leeds & Hanley Theater v. Broadbent, [1898] 1 Ch. 343.

"Originally payment was the per-

formance of a promise to pay money at the time and in the manner required by the terms of the contract; but it has been extended to include the delivery of money in satisfaction of a debt after a default has been made in payment according to the terms of the contract." Ulsch v. Muller, 143 Mass. 379, 9 N. E. Rep. 736.

A cross-demand is not payment and cannot be treated as such unless by agreement of the parties. McCurdy v. Middleton, 82 Ala. 131, 2 So. Rep. 721; Wharton v. King, 69 Ala. 365.

<sup>2</sup> See Bottomley v. Nuttall, 5 C. B. (N. S.) 122, 134, 135.



the debtor must seek the creditor to pay him.<sup>1</sup> But if a lease is silent as to the place where rent is to be paid the landlord must make a demand of payment on the land before he can declare a forfeiture, notwithstanding the tenant has theretofore sought him for the purpose of making payment.<sup>2</sup> If there is no agreement on the subject the purchase price of property is payable at the office of the vendors; to their agents or to them in person.<sup>3</sup> But if the place of payment is designated and the presence of the payee is necessary, he must attend; and if either of two places is agreed upon he must select, and there is no default until he has done so.<sup>4</sup> If the creditor refuses to receive payment at the place appointed by him and does not inform his debtor of a purpose to require it to be made elsewhere, he waives the right to payment at another than the designated place and cannot reap any benefit from his act.<sup>5</sup> The duty of the debtor to seek his creditor does not require that he should do so beyond the limits of the state or country in which the debt was contracted, and by implication or express agreement was to be paid.<sup>6</sup> But as nothing but actual payment will discharge the debt, this duty of seeking the creditor will more properly be considered in connection with the subject of tender.<sup>7</sup> It may, however, be added here that if the debtor is a municipality, county, state or government the obligation is not dischargeable at any other place than its treasury,<sup>8</sup> unless some other place be designated. A county

<sup>1</sup> *Cranley v. Hillary*, 2 M. & S. 120; *tell v. Nichols' Adm'r*, Hardin, 66; *Soward v. Palmer*, 2 Moore, 276; *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237, 31 S. E. Rep. 969.

<sup>7</sup> §§ 260-270.

<sup>2</sup> *Rea v. Eagle Transfer Co.*, 201 Pa. 273, 50 Atl. Rep. 764.

<sup>3</sup> *Greenawalt v. Este*, 40 Kan. 418, 19 Pac. Rep. 803; *Baker v. Holt*, 56 Wis. 100, 14 N. W. Rep. 8; *Northwestern Iron Co. v. Meade*, 21 Wis. 480.

<sup>4</sup> *Thorn v. City Rice Mills*, 40 Ch. Div. 357.

<sup>5</sup> *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 286, 3 L. R. A. 90.

<sup>6</sup> *King v. Finch*, 60 Ind. 423; *Lit-*

<sup>8</sup> *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; *Boyle's Lunacy*, 20 Pa. Super. Ct. 1; *People v. Tazewell County*, 22 Ill. 147; *Johnson v. Stark County*, 24 id. 75; *South Park Com'rs v. Dunlevy*, 91 id. 49; *Friend v. Pittsburgh*, 131 Pa. 305, 6 L. R. A. 636, 17 Am. St. 811, 18 Atl. Rep. 1060; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. Rep. 337; *Monteith v. Parker*, 36 Ore. 170, 59 Pac. Rep. 192; *Williamson County v. Farson*, 101 Ill. App. 328, 199 Ill. 71, 64 N. E. Rep. 1086.

which issued bonds containing a reservation of the right to pay them after a certain date, prior to their maturity, was not bound to seek the holders of them and give notice of its election to pay them after a date duly fixed by the authorities. Its duty was discharged by giving ample notice through newspapers of the exercise of its option that the bonds would be paid at the place named therein. By placing the funds there the debtor discharged its duty to the bondholders and was not liable to them for interest thereafter.<sup>1</sup>

If a debtor is directed by his creditor to remit money by mail, or if that be the usual mode of remitting it, and the remittance be lost, the creditor must sustain the loss.<sup>2</sup> In such case compliance with the direction in respect to the mode of remittance fulfills all the requisites of payment — tender and acceptance, — both of which are essential. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose.<sup>3</sup>

<sup>1</sup> *Stewart v. Henry County*, 66 Fed. Rep. 127; *Ward v. Smith*, 7 Wall. 450. See *Williamson County v. Farson*, *supra*.

<sup>2</sup> *Colvin v. United States Mut. Accident Ass'n*, 66 Hun, 543, 21 N. Y. Supp. 734; *Primeau v. National L. Ass'n*, 77 Hun, 418, 28 N. Y. Supp. 794; *McCluskey v. Same*, 77 Hun, 566, 28 N. Y. Supp. 931, affirmed without opinion, 149 N. Y. 616; *Guilfoyle v. National L. Ass'n*, 36 App. Div. 343, 55 N. Y. Supp. 236; *Jung v. Second Ward Savings Bank*, 55 Wis. 364, 42 Am. Rep. 719, 13 N. W. Rep. 235; *Warwicke v. Noakes, Peake*, 67. See *Parker v. Gordon*, 7 East, 385. *Compare State v. Insurance Co.*, 106 Tenn. 282, 61 S. W. Rep. 75.

If no mode of remitting is indicated by the creditor a remittance made in the way a prudent man would do if he was paying his own debt relieves an agent from responsibility. *Underwriters' Wrecking Co. v. Board of Underwriters*, 35 La. Ann. 803.

In the absence of an express direction to remit by mail or a usage or course of dealing from which authority to so remit may be inferred, a remittance of money so made is at the risk of the party mailing it. *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437.

There is no evidence of payment when the instrument remitted describes the payee by a wrong christian name, though he keeps it and might have obtained the money by signing it in the name used. *Gordon v. Strange*, 1 Ex. 477.

<sup>3</sup> *Slaughter v. Slaughter*, 7 Houst. 482, 32 Atl. Rep. 857; *Lofland v. McDaniel*, 1 Pennewill, 416, 41 Atl. Rep. 882; *Holdsworth v. De Belaunzaran*, 106 N. Y. 119, 12 N. E. Rep. 615; *Robinson v. Robinson*, 20 S. C. 567; *Steiner v. Erie Dime Savings & L. Co.*, 98 Pa. 591; *Ryan v. O'Neil*, 49 Mich. 281, 13 N. W. Rep. 591; *Kings-ton Bank v. Gay*, 19 Barb. 459. See *Collins v. Adams*, 53 Vt. 433.

A promise by a creditor to cover a

It is, however, competent for parties to agree that payments shall be made in something else of value than money.<sup>1</sup> If an employer and employee stipulate that advances made to the latter should be repaid by services, the former is bound to accept payment in that mode, and if he permits the employee to be involuntarily driven from the service by a co-employee the debt is extinguished.<sup>2</sup> A note payable in property may be satisfied by the payment of money;<sup>3</sup> by failing to pay in prop-

check signed by a third person in favor of the debtor does not prevent the check, on its transfer to the creditor and appropriation by him, from operating as payment. *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. Rep. 227.

Payment implies a voluntary act of the debtor looking to the satisfaction, in whole or in part, of the demand against him. A creditor cannot lawfully pay himself with the debtor's money without the latter's consent, express or implied; and when the debtor delivers him money for a purpose which negatives the idea of payment the creditor's control of it is limited to the purpose declared. *Detroit, etc. R. Co. v. Smith*, 50 Mich. 112, 15 N. W. Rep. 39.

Monthly payments made on a chattel mortgage in consideration, as stated in receipts therefor, of the extension of the time for payment of the mortgage debt from month to month will be applied in extinguishment of such debt. *Bateman v. Blake*, 81 Mich. 227, 45 N. W. Rep. 831.

If money paid unconditionally is retained its acceptance cannot be made conditional unless notice to that effect is in fact given the payor. *Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 85 N. E. Rep. 855, 39 Am. St. 475.

<sup>1</sup> *United Water Works Co. v. Farmers' Loan & Trust Co.*, 11 Colo. App. 225, 240, 53 Pac. Rep. 511; *Webb v. Vermillion*, 13 Ky. L. Rep. 367 (Ky. Super. Ct.); *Rider v. Culp*,

68 Mo. App. 527; *Pinson v. Puckett*, 35 S. C. 178, 14 S. E. Rep. 393; *Van Werden v. Equitable L. Assur. Society*, 99 Iowa, 621, 68 N. W. Rep. 892; *Bixby v. Grand Lodge Ancient Order United Workmen*, 105 Iowa, 505, 70 N. W. Rep. 737; *Stirna v. Beebe*, 11 App. Div. 206, 42 N. Y. Supp. 614; *Weir v. Hudnut*, 115 Ind. 525, 18 N. E. Rep. 24; *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. Rep. 832; *Phillips v. Ocmulgee Mills*, 55 Ga. 633. See § 215.

Payment is made "at the time," within the meaning of the statute of frauds, where the vendor accepts as payment a check which is then good and which is subsequently paid, though the time of payment is not shown. *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Elwell v. Jackson*, 1 Cab. & Ellis, 362.

The "good will" of a business has a market value so that it may be accepted in payment of a subscription for stock. *Beebe v. Hatfield*, 67 Mo. App. 609.

<sup>2</sup> *Hanlin v. Walters*, 3 Colo. App. 519, 34 Pac. Rep. 686.

<sup>3</sup> *Leapald v. McCartney*, 14 Colo. App. 442, 60 Pac. Rep. 640, citing *Pinney v. Gleason*, 5 Wend. 394, 21 Am. Dec. 223; *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *Hise v. Foster*, 17 Iowa, 23; *Ferguson v. Hogan*, 25 Minn. 135; *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277; *White v. Tompkins*, 52 Pa. 363; *Trowbridge v. Holcomb*, 4 Ohio St. 38.

erty on the stipulated day the debtor forfeits his election to pay either in that mode or in money, and the creditor may demand money.<sup>1</sup> If a contract may be satisfied by delivery of a commodity as ordered by the payee, the failure to fill an order renders the balance due payable in money, and the acceptance of another order in the course of business does not reinstate the clause of the contract as to the mode of payment.<sup>2</sup>

The defendants forwarded to the plaintiffs sufficient funds to pay a note held by the latter against the former, but they refused to receive it, and informed the defendants that the money was subject to their order. There was no payment; if the defendants would protect themselves against costs they should have withdrawn the deposit and made a tender.<sup>3</sup> The weight of authority is, as will be seen in the section on accord and satisfaction, that the payment of a less sum than is due does not discharge a liquidated demand unless a sealed acquittal is given as evidence of the fact.<sup>4</sup> But this principle does not apply if something else of value than money is received, though the security accepted is of inferior rank to that which it is received in lieu of,<sup>5</sup> or is less in amount,<sup>6</sup> if the parties agree that

<sup>1</sup> *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. Rep. 485; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Robbins v. Luce*, 4 Mass. 474; *Caldwell v. Dutton*, 20 Tex. Civ. App. 369, 49 S. W. Rep. 723; *Brashear v. Davidson*, 31 Tex. 191; *Haskins v. Dern*, 19 Utah, 89, 56 Pac. Rep. 953; *Texas & P. R. Co. v. Marlor*, 123 U. S. 687, 8 Sup. Ct. Rep. 311; *Pearson v. Williams*, 24 Wend. 244; *Roberts v. Beatty*, 2 P. & W. 63, 21 Am. Dec. 410; *Renwick v. Goldstone*, 48 Cal. 554; *Smith v. Coolidge*, 68 Vt. 516, 35 Atl. Rep. 432, 54 Am. St. 902.

<sup>2</sup> *Smith v. Coolidge*, *supra*.

<sup>3</sup> *Kingston Bank v. Gay*, 19 Barb. 459; *Greenough v. Walker*, 5 Mass. 214; *Clark v. Wells*, 5 Gray, 69.

After the commencement of an action upon a note by the indorsee against the maker its payment by the payee and indorser does not constitute a defense so as to affect the

costs. *Concord Granite Co. v. French* 12 Daly, 228.

An answer by a surety alleged that the plaintiff had been fully paid by money received from the principal debtor's estate and with the administrator's consent; held to show that the latter agreed that the money so received should be payment. *Johnson v. Breedlove*, 104 Ind. 521, 6 N. E. Rep. 906.

<sup>4</sup> *Grinnell v. Spink*, 128 Mass. 25; *Tuttle v. Tuttle*, 12 Met. 551, 46 Am. Dec. 701; *Harriman v. Harriman*, 12 Gray, 341; *Baldwin v. United States*, 15 Ct. of Cls. 297; *Bostwick v. Same*, 94 U. S. 53.

<sup>5</sup> *Peters v. Barnhill*, 1 Hill (S. C.), 237; *Dogan v. Ashbey*, 1 Rich. 36.

<sup>6</sup> *Fensler v. Prather*, 43 Ind. 119; *Wells v. Morrison*, 91 id. 51; *Sibree v. Tripp*, 14 M. & W. 23; *Thomas v. Heathorn*, 2 B. & C. 477; *Bush v. Abraham*, 25 Ore. 336, 35 Pac. Rep.

it shall be payment. There are well considered cases by courts of good standing to the effect that "if one owing a sum of money, the amount of which is not ascertained and fixed, offers his creditor a certain sum, declaring that it is in full for all that is owing him, which sum is accepted by the creditor, such acceptance is in full discharge of the demand."<sup>1</sup> If a debtor mails to his creditor a statement of the account between them and sends the balance which he admits to be due, requesting a receipt in full, the claim will be satisfied if the creditor retains the money.<sup>2</sup> "When one gets his due ignorantly, if he is not hurt by his ignorance, it is the same as if he acted with knowledge. Thus, where a negotiable note was transferred before maturity as collateral, and was afterwards paid off in property, not to the holder but to the payee, who collected without authority, and who, after converting the property into money, transmitted the proceeds to the holder as his own money, and the holder applied the same to the secured debt only, not applying it also to the collateral, and not knowing that he was dealing with a fund derived from the collateral, this was a discharge of the collateral debt, notwithstanding such ignorance on the part of the holder."<sup>3</sup>

§ 215. **Same subject.** The creditor may assent in advance to a mode of payment which reserves no subsequent election by excluding any concurrent act on his part in accomplishing it, or by making any such act obligatory. Thus, an award made against a party in pursuance of a submission in which he agreed to indorse it on a note is a payment *pro tanto*.<sup>4</sup> So money paid by a debtor to a third person on the prior request of the creditor is a payment,<sup>5</sup> and so is the transfer of a credit if all the parties are agreed.<sup>6</sup> The acceptance by a debtor of

1066; Bolt v. Dawkins, 16 S. C. 198, 214.

<sup>1</sup> American Manganese Co. v. Virginia Manganese Co., 91 Va. 272, 284, 21 S. E. Rep. 466, citing Donohue v. Woodbury, 6 Cush. 148; McDaniels v. Lapham, 21 Vt. 222; McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406.

<sup>2</sup> Rumsey v. Barber, 78 Ill. App. 88, citing Ostrander v. Scott, 161 Ill. 339, 43 N. E. Rep. 1089.

<sup>3</sup> Coleman v. Jenkins, 78 Ga. 607, 3 S. E. Rep. 444; Butts v. Whitney, 96 Ga. 445, 23 S. E. Rep. 397.

<sup>4</sup> Flint v. Clark, 12 Johns. 374.

<sup>5</sup> Brady v. Durbrow, 2 E. D. Smith, 78; Storey v. Menzies, 3 Pin. 329.

<sup>6</sup> Eyles v. Ellis, 4 Bing. 112; Shryer v. Morgan, 77 Ind. 479; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. Rep. 688, 78 id. 197; Daniel v. St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. Rep. 214.

a written order of his creditor to pay money to a third person entitles the former to a credit to the extent of the sum called for by the order, although payment was not then made, if the debtor was solvent and his liability fixed,<sup>1</sup> and it is immaterial that the debtor thought he had not accepted the order, and paid it only after judgment was rendered against him.<sup>2</sup> The tender of bonds, etc., of a banking association to them in payment of a debt, in pursuance of their agreement to receive them in payment,<sup>3</sup> or work done for the payee of a note by the maker under an agreement that the proceeds are to be applied to discharge the note, is a payment.<sup>4</sup> Where it is agreed between debtor and creditor that the former shall do some collateral act for a stipulated price or a price which may be made certain, and that such act shall be deemed a payment or part payment of the debt, the amount so stipulated becomes at [347] once a payment when the act has been performed.

In case of mutual connected debts it is not necessary that the formality should be gone through of each party handing the amount he owes over to the other, whether the sums they are mutually entitled to be equal or not. If they are equal they wholly cancel each other; if not equal the lesser is to be deducted from the greater. These compensations, when they fairly and properly occur, are reciprocal payments.<sup>5</sup> An agree-

If an insurance agent gives credit for the premium due on a policy and insurer charges him with the amount, the transaction is equivalent to payment. *Wytheville Ins. & Banking Co. v. Teiger*, 90 Va. 277, 18 S. E. Rep. 195; *Miller v. Life Ins. Co.*, 12 Wall. 285; *White v. Connecticut Ins. Co.*, 120 Mass. 330; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Bang v. Farmville Ins. Co.*, 1 Hughes, 290; *Griffith v. New York L. Ins. Co.*, 101 Cal. 627, 36 Pac. Rep. 613, 40 Am.-St. 96.

<sup>1</sup> *Merwin v. Austin*, 58 Conn. 22, 18 Atl. Rep. 1029, 7 L. R. A. 84.

<sup>2</sup> *Carroll v. Weaver*, 65 Conn. 76, 31 Atl. Rep. 489.

<sup>3</sup> *Leavitt v. Beers, Hill & Denio*, 221. See *Northampton Bank v. Bal-*

*liet*, 8 W. & S. 311, 42 Am. Dec. 297; *Woodruff v. Trapnall*, 12 Ark. 811, 10 How. 190; *Exchange Bank v. Knox*, 19 Gratt. 739; *Mann v. Curtis*, 6 Robert. 128.

<sup>4</sup> *Moore v. Stadden, Wright*, 88; *Hall v. Holmes*, 4 Pa. 251.

<sup>5</sup> *Rutherford v. Schattman*, 119 N. Y. 604, 23 N. E. Rep. 440; *Iron Cliffs Co. v. Gingrass*, 42 Mich. 30, 3 N. W. Rep. 238; *Roberts v. Wilkinson*, 34 Mich. 129; *Connecticut Mut. Ins. Co. v. State Treasurer*, 31 Mich. 6; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. Rep. 97; *McKeon v. Byington*, 70 Conn. 429, 39 Atl. Rep. 853. See *Sword v. Keith*, 31 Mich. 247; *Jewett v. Winship*, 42 Vt. 205; *Slason v. Davis*, 1 Aik. 73; *Strong v. McConnell*, 10 Vt. 231; *Chellis v.*

ment between parties having mutual demands to set off one against the other would seem on principle and the weight of authority to take effect also as reciprocal payments, and the same result follows in all cases of connected accounts.<sup>1</sup> Thus,

Woods, 11 Vt. 466; Robinson v. Hurlburt, 34 Vt. 115; Bronson v. Rugg, 39 Vt. 241; Downer v. Sinclair, 15 Vt. 495; Huffmans v. Walker, 26 Gratt. 314; Eaves v. Henderson, 17 Wend. 190.

<sup>1</sup> In Davis v. Spencer, 24 N. Y. 386, it was held that an agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates *in presenti* as a satisfaction of the note *pro tanto*. Allen, J., said: "Formerly there appears to have been a doubt whether an agreement to set off precedent debts operated as payment, satisfaction or extinguishment. An accord that each of the parties should be quit of actions against the other was said not to be good because it was not any satisfaction. Bac. Abr., Accord, A. But there is no difference in principle between an agreement concerning debts, one of which is to be contracted in the future, as in Eaves v. Henderson, 17 Wend. 190, and an agreement concerning debts already existing; and it has been decided that an agreement to discontinue and a discontinuance of cross-actions for false imprisonment constitute an accord and satisfaction, and bar another action by either. Foster v. Trull, 12 Johns. 456. Whenever a valid new contract is substituted in the place of the old, . . . an action will not lie on the old contract, but the remedy of the parties is on the new or substituted agreement although the transaction may not amount to a technical accord and satisfaction. Good v. Cheesman, 2

B. & Ad. 328. Where two brothers, A. and B., principal and surety in an annuity, had, in an agreement between them and a third brother for the settlement of their affairs, declared that the bond was the debt of B., the surety, it was held that this agreement, whether subsequently acted upon or not, was a binding accord between A. and B. Cartwright v. Cooke, 3 B. & Ad. 701. Hills v. Mesnard, 10 Q. B. 266, is in principle not unlike Eaves v. Henderson, *supra*. The action was by payees against acceptors of a bill. The defendants became acceptors for the accommodation of one Hundle, and the plaintiffs, the payees, agreed to appropriate certain moneys which they expected to receive in discharge of the bill. They subsequently received the money, and the court held it a payment of the bill *pro tanto*. Lord Denman, C. J., says: It was competent for the parties to agree beforehand that the money should be specifically applied to the discharge of the liability on the bill *pro tanto*. 'And it seems to be the good sense of the transaction to treat it as so much money paid to the plaintiffs by Hundle on their account and as their agent.' Gardiner v. Callender, 12 Pick. 374, is in point, and decides that when E. H. R., one of the executors of A. S., gave to the executors of W. P. a memorandum as follows: 'It is agreed that the sum \$3,235, due from E. H. R. to the estate of W. P., shall be applied on a certain note of \$6,000 now held by the representatives of A. S.,' the memorandum amounted to a payment on the note and was not merely an executor's agreement. The fact that a memo-

[348] if A. has a valid and subsisting demand against B. for goods, services or cash, constituting proper items of an account upon which he has a present right of action, and before commencing suit thereon credits on such account a demand B. has against him for services at their fair and full value, such credit by A. so far operates as payment that B. cannot maintain an action for his demand brought while such other suit [349] is pending.<sup>1</sup> But where A. owes B. by promissory note payable in instalments, and at the same time holds a note against B. for a larger amount, on which he indorses as part payment the amount of the instalments of his own note as they fall due, but without B.'s consent, this is not a payment of the instalments.<sup>2</sup> A payment by credit occurs where a bank receives a check drawn on itself and credits the holder the amount,<sup>3</sup> or where the bank is the creditor and receives

random in writing was made of the agreement does not vary its legal effect. It was not required by law to be in writing. The court, as in *Hills v. Mesnard*, sought the good sense of the transaction, and to give effect to the sensible arrangement of the parties, holding that it could not be necessary, in order to connect the one debt with the other by an agreement *in presenti*, that there should be the vain formality of passing the money from one party to the other and returning it again to the party from whom it just came, or that a formal release or receipt should be executed. This case is not cited by counsel or alluded to by the court in the subsequent case of *Cary v. Bancroft*, 14 Pick. 315, but the latter was decided upon a ground which distinguished it from the former case; the court holding that in the case last cited the agreement was executory and not executed, requiring some further act to be done before the one note would operate as payment or extinguishment *pro tanto* of the other. *Dehon v. Stetson*, 9 Met. 341, followed *Cary v. Bancroft*, and was decided upon the same ground.

Another point was in the case, to wit: that one of the parties interested in the debt which it was sought to apply in payment as the individual debt of one of his partners had not been consulted, and had no knowledge of the contemplated arrangement." See *Peabody v. Peters*, 5 Pick. 1; *Dudley v. Stiles*, 32 Wis. 371; *Ely v. McNight*, 30 How. Pr. 97; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 183; *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Fatlock v. Harris*, 4 D. & E. 180; *Wilson v. Coupland*, 5 B. & Ald. 228; *Wharton v. Walker*, 4 B. & C. 163; *Cuxon v. Chadley*, 3 B. & C. 591.

<sup>1</sup> *Briggs v. Richmond*, 10 Pick. 391, 20 Am. Dec. 526; *Allen v. Carman*, 1 E. D. Smith, 692; *Means v. Smith*, Tappan, 60.

<sup>2</sup> *Greenough v. Walker*, 5 Mass. 214. See *Clark v. Wells*, 5 Gray, 69.

A payment to a vendor on his own obligations is a payment in cash. *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. Rep. 425; *Foley v. Mason*, 6 Md. 37.

<sup>3</sup> *Addie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Bank v.*



the debtor's check drawn on itself.<sup>1</sup> There is a distinction between the acceptance by a creditor from his debtor of a new security for an old debt, and the acceptance by a bank of a check drawn upon itself in payment of a note. The former is a mere substitution of one executory agreement to pay for another, or a commutation of securities; there is no extinguishment of the precedent debt unless there is an agreement to accept the new obligation or security as a satisfaction of the old. But when a bank receives upon a debt a check drawn upon itself by one of its customers and charges it in account, it thereby admits that it has funds of the drawer sufficient to meet the check, and the acceptance is *per se* an appropriation of the funds to pay it. The transaction operates directly as a payment of the debt.<sup>2</sup> If the dividends on a policy of life insurance equal the premiums and have, in the immediately preceding years, at the request of the insured or his beneficiary, been applied to the payment of the premiums as they became due, the latter are paid as fast as they become due so long as the conditions stated exist.<sup>3</sup> So long as money illegally exacted from a member of a benefit society remains in its treasury and is sufficient to meet assessments made upon him he is not in default.<sup>4</sup>

By a valid new agreement the debtor may obtain the right to pay otherwise than in money; and the acceptance by the

Burkhardt, 100 U. S. 688; American Exchange Nat. Bank v. Gregg, 138 Ill. 596, 32 Am. St. 171, 28 N. E. Rep. 839 (although the bank may fail to charge the drawer with the amount); Watkins v. Parsons, 13 Kan. 426; Weedsport Bank v. Park Bank, 2 Keyes, 561.

<sup>1</sup> Pratt v. Foote, 9 N. Y. 463; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551.

If the guarantor of a note owned and held by a bank has on deposit in it a sum nearly equal to the amount called for by the note, a tender of his check for such sum and the necessary amount of cash to the assignee of the bank satisfies the note. Lionberger v. Kinealy, 13 Mo.

App. 41. See Shipp v. Stacker, 8 Mo. 145.

<sup>2</sup> Id.; Commercial Bank v. Union Bank, 11 N. Y. 203.

If a sight draft is indorsed for collection to the debtor's bankers and by his direction the amount it calls for is charged against him, the banker drawing his check for the amount to the order of the creditor and transmitting it to him, the debt is paid, although the bank which so draws fails and its check is made valueless. Welge v. Batty, 11 Ill. App. 461.

<sup>3</sup> Matlock v. Mutual L. Ins. Co., 180 Pa. 360, 36 Atl. Rep. 1082.

<sup>4</sup> Knight v. Supreme Court Order of Chosen Friends, 2 Silvernail, 453, 6 N. Y. Supp. 427.

creditor of any chose in action or property will operate as payment.<sup>1</sup> The receipt by the creditor of bank bills or treasury notes in payment of a gold debt, although under protest and with an express reservation of a claim for the difference, will be payment dollar for dollar.<sup>2</sup> So gold dollars, if applied [350] towards the payment of a debt without any special contract as to the value at which they are to be taken, cannot be treated as having any greater value than any other currency which is a legal tender for the payment of debts.<sup>3</sup> The common-law rule that marriage has the legal effect of paying or extinguishing a debt the husband might owe the wife, or the wife the husband at the time of marriage, is in force in Kentucky.<sup>4</sup>

§ 216. **Same subject.** On the foreclosure of a mortgage on real estate by entry the land inures as payment to the extent of its value.<sup>5</sup> So taking possession of chattels mortgaged or forfeited is also payment to the amount of their value;<sup>6</sup> and the proceeds of sale realized by foreclosure are *pro tanto* payment.<sup>7</sup> Taking the debtor's body is a satisfaction unless he escape.<sup>8</sup> It has this effect though the creditor consented to his being set at liberty under an agreement which the debtor has failed to perform;<sup>9</sup> or on his giving a warrant of attorney which turned out to be void for informality.<sup>10</sup> It is not, however, an absolute satisfaction like payment, for it will not discharge a guarantor,<sup>11</sup> nor prevent the creditor from pursuing his remedy against other parties.<sup>12</sup>

<sup>1</sup> *Inman v. Griswold*, 1 Cow. 199; *Briggs v. Richmond*, id. 391, 20 Am. Dec. 526.

*Sword v. Keith*, 31 Mich. 247; *Block v. Dorman*, 51 Mo. 31; *Casey v. Harris*, 2 Litt. 172; *Allegheny R. Co. v. Casey*, 79 Pa. 84; *Eaves v. Henderson*, 17 Wend. 190; *Perkins v. Cady*, 111 Mass. 318; *Locke v. Andres*, 7 Ired. 159; *Perit v. Pittfield*, 5 Rawle, 166; *Cramer v. Willetts*, 61 Ill. 481; *Brown v. Feeter*, 7 Wend. 301; *Burchard v. Frazer*, 23 Mich. 224.

<sup>2</sup> *Gilman v. Douglas County*, 6 Nev. 27, 3 Am. Rep. 237.

<sup>3</sup> *Bush v. Baldrey*, 11 Allen, 367.

<sup>4</sup> *Farley v. Farley*, 91 Ky. 497, 16 S. W. Rep. 129.

<sup>5</sup> *Hedge v. Holmes*, 10 Pick. 381;

<sup>6</sup> *Case v. Boughton*, 11 Wend. 106; *Charter v. Stevens*, 3 Denio, 33.

<sup>7</sup> *Lansing v. Goelet*, 9 Cow. 346; *Globe Ins. Co. v. Lansing*, 5 id. 380, 15 Am. Dec. 474.

<sup>8</sup> *Jaques v. Witby*, 1 T. R. 557; *Williams v. Evans*, 2 McCord, 203.

<sup>9</sup> *Vigers v. Aldrich*, 4 Burr. 2482; *Blackburn v. Stupart*, 2 East, 243; *Tanner v. Hague*, 7 T. R. 420.

<sup>10</sup> *Jaques v. Witby*, *supra*; *Loomis v. Storrs*, 4 Conn. 440. See *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176.

<sup>11</sup> *Terrell v. Smith*, 8 Conn. 426.

<sup>12</sup> *Porter v. Ingraham*, 10 Mass. 88.

A levy on sufficient personal property by execution is presumably a satisfaction of the debt; it is a means of payment, and requires only the performance of a ministerial duty by an officer to accomplish it. The levy is not of itself satisfaction, and anything which subsequently, without the fault of the officer or creditor, prevents actual satisfaction, as if the debtor has not been deprived of property levied upon, will destroy its effect as evidence of that result.<sup>1</sup> So long as the [351] property remains in legal custody the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor.<sup>2</sup> The levy does not divest title; it only creates a lien on the property. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone. The judgment is satisfied when the execution has been so used as to change the title or in some other way to deprive the debtor of his property. This includes the case of a levy and sale, and also of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process.<sup>3</sup> In admiralty, where a *res* is seized by a judicial process for a debt which carries with it a *jus in re*, as between debtor and creditor, the maxim *domino perit res* means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding and unite, so to speak,

<sup>1</sup>Starr v. Moore, 3 McLean, 354; Clerk v. Withers, 2 Ld. Raym. 1072, 1 Salk. 323, 6 Mod. 290; Mountney v. Andrews, Cro. Eliz. 237; Atkinson v. Atkinson, id. 391; Ladd v. Blunt, 4 East, 402; Bayley v. French, 2 Pick. 590; Denton v. Livingston, 9 Johns. 98; Hoyt v. Hudson, 13 id. 207; Troup v. Wood, 4 Johns. Ch. 228; Ex parte Lawrence, 4 Cow. 417, 15 Am. Dec. 386; Jackson v. Bowen, 7 Cow. 13, 21, Cornell v. Cook, id. 312; Wood v. Torrey, 6 Wend. 562; Cass v. Adams, 3 Ohio, 223; Webb v. Bumpass, 9 Port. 201, 23 Am. Dec. 310; Green v. Burke, 23 Wend. 490; Browning v. Hanford, 5 Hill, 588; Duncan v. Harris, 17 S. & R. 436; Farmers' & M. Bank v. Kingley, 2 Doug. (Mich.) 379; Churchill v. Warren, 2 N. H. 298; Ordinary v. Spann, 1 Rich. 429; Porter v. Boone, 1 W. & S. 252; Ex parte King, 2 Dev. 341, 21 Am. Dec. 335; Binford v. Alston, 4 Dev. 354.

<sup>2</sup>People v. Hopson, 1 Denio, 577.

<sup>3</sup>Id.

in the seizure, also asserting claims which carry with them liens, the destruction of the property, without fault of the debtor, works a payment of their respective claims, to the extent of the value of the property destroyed, in the order of the priority of their claims, and operates as a payment up to its value precisely as would its sale and the application of its proceeds.<sup>1</sup>

A sufficient tender, made and kept good by bringing the money into court, is equivalent to a payment, and is such of the date of the tender to prevent costs and interest. The debtor pleading it cannot withdraw the money whatever may be the verdict; the money must be paid to the plaintiff.<sup>2</sup>

§ 217. **What is not payment.** The deposit of money in a bank where a note is payable is not of itself a payment, but simply a tender,<sup>3</sup> unless in some way appropriated to the note;<sup>4</sup> nor is the surrender of a check at the clearing-house.<sup>5</sup> A note held by an administrator and payable to him is not paid because he charges himself with the amount it represents in settling his accounts with the estate.<sup>6</sup> So charging a note supposing the maker had funds in bank, when in fact he had not, the charge being canceled the next day on discovery of the mistake, will not amount to payment.<sup>7</sup> And where the president of a bank, having his notes lying therein under protest, indorsed for his accommodation, procured the cashier to make a new note, which the president indorsed and exchanged for those protested, delivering the latter to the cashier for his security, the original notes were not thereby paid, although the president entered them as paid and all new notes as dis- [352] counted.<sup>8</sup> A clerk of a bank stole from the drawer of another clerk bills belonging to the bank, which he delivered to the cashier, and which the latter, not knowing them to have been thus stolen, accepted in discharge of the balance due from such clerk to the bank; the transaction did not work a

<sup>1</sup> Per Billings, D. J., in *Gill v. Packard*, 4 Woods, 270.

<sup>2</sup> *Reed v. Armstrong*, 18 Ind. 446; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561, 23 N. E. Rep. 1106.

<sup>3</sup> *Hill v. Place*, 36 How. Pr. 26.

<sup>4</sup> See *Sutherland v. First Nat. Bank*, 31 Mich. 230.

<sup>5</sup> *Merchants' Nat. Bank v. Procter*, 1 Cin. Super. Ct. 1.

<sup>6</sup> *Robinson v. Robinson*, 20 S. C. 567.

<sup>7</sup> *Troy City Bank v. Grant, Hill & Denio*, 119.

<sup>8</sup> *Highland Bank v. Dubois*, 5 Denio, 558.

payment.<sup>1</sup> The mutilation of a note by a stranger to it, with intent to cancel and extinguish it, raises no presumption of its payment.<sup>2</sup> The receipt of part of the amount due is not a waiver of the right to recover the balance, nor does it work an estoppel.<sup>3</sup> A note is not paid because its maker placed in the hands of the payee's attorney, who had the note for collection, notes and accounts to be collected, on which certain sums were paid the attorney, but not credited or applied on such note, the payee of which had not concurred in such arrangement. The attorney was agent for the debtor in making collections, and money paid him was the property of the latter. Until applied or appropriated it could not become a payment on the note.<sup>4</sup> Surrendering a city warrant calling for the payment of a large sum for others amounting in all to the same sum, these being dated and indorsed as was the original, is a mere exchange.<sup>5</sup> An insurance assessment is not paid by depositing the necessary sum in the mail in the absence of anything in the dealings between the parties giving such deposit that effect.<sup>6</sup> If money which reaches insurer after it is due is tendered insured within a reasonable time it is not payment.<sup>7</sup> An insurer owing an insured employee money is not bound to apply any part of its indebtedness on the payment of an assessment due from him.<sup>8</sup> An insurance premium is not paid by a confession of judgment for the amount of premium notes held by insurer.<sup>9</sup> Thus it appears that unless there is an actual payment and receipt of money, or something else accepted in its place as

<sup>1</sup> *State Bank v. Wells*, 3 Pick. 394.

<sup>2</sup> *Whitlock v. Manciet*, 10 Ore. 166.

The destruction of a note held by a wife against her husband, under the influence of feelings caused by his cruel treatment of her, is not a satisfaction of the debt. *Schlemmer v. Schendorf*, 20 Ind. App. 447, 49 N. E. Rep. 968.

<sup>3</sup> *Hodges v. Tennessee Implement Co.*, 123 Ala. 572, 26 So. Rep. 490; *Greer v. Laws*, 56 Ark. 37, 18 S. W. Rep. 1038; *Clark v. Equitable L. Assur. Society*, 76 Miss. 22, 23 So. Rep. 453; *Whiting v. Plumas County*, 64 Cal. 65, 28 Pac. Rep. 445.

<sup>4</sup> *Hatch v. Hutchinson*, 64 Ark. 119, 40 S. W. Rep. 578; *Moore v. Norman*, 52 Minn. 83, 53 N. W. Rep. 809, 38 Am. St. 526, 18 L. R. A. 359.

<sup>5</sup> *Monteith v. Parker*, 36 Ore. 170, 59 Pac. Rep. 192.

<sup>6</sup> *Rice v. Grand Lodge Ancient Order United Workmen*, 103 Iowa, 643, 72 N. W. Rep. 770.

<sup>7</sup> S. C., 92 Iowa, 417, 60 N. W. Rep. 726.

<sup>8</sup> *Pister v. Keystone Mut. Ben. Ass'n*, 3 Pa. Super. Ct. 50.

<sup>9</sup> *Proebstel v. State Ins. Co.*, 14 Wash. 669, 45 Pac. Rep. 308.

payment, a debt is not satisfied; any ceremony by which payment is nominally made or acknowledged may be avoided for mistake or fraud, and so where the actual or authorized assent of the creditor is wanting.<sup>1</sup>

§ 218. **Effect of payment.** Whether a payment made by a guarantor or surety or a volunteer will operate as a purchase or as an extinguishment depends on the intention with which it is made.<sup>2</sup> But a debtor cannot himself become the owner,<sup>3</sup> nor pay his debt without discharging it, though he may wish and intend to keep it on foot;<sup>4</sup> and any assignment to a third person with a view to keeping it alive will be void.<sup>5</sup> A pay-

<sup>1</sup> *Hayden v. Lauffenburger*, 157 Mo. 88, 57 S. W. Rep. 721.

<sup>2</sup> *Fogarty v. Wilson*, 30 Minn. 289, 15 N. W. Rep. 175; *Swope v. Leffingwell*, 72 Mo. 348; *Lucas v. Wilkinson*, 1 Hurl. & N. 423; *Morris v. Oakford*, 9 Pa. 498; *Kinley v. Hill*, 4 W. & S. 426; *Elkinton v. Newman*, 20 Pa. 281; *Carter v. Jones*, 5 Ired. Eq. 196, 49 Am. Dec. 425; *Mathews v. Aiken*, 1 N. Y. 595; 1 Lead. Cas. in Eq. 88; id. pt. 1, 167 (2d Am. ed.); *Low v. Blodgett*, 21 N. H. 121; *Ex parte Balch*, 2 Low. 440; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Mechanics' Bank v. Hazard*, 13 Johns. 353. See *Gillett v. Gillett*, 9 Wis. 194.

In Louisiana the payment of a note secured by a mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid, but will extinguish the debt and the mortgage securing it, and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made. *Nicholls v. His Creditors*, 9 Rob. 476; *Weil v. Enterprise Ginney & Manuf. Co.*, 42 La. Ann. 492, 7 So. Rep. 622.

<sup>3</sup> *Kingsley v. Purdom*, 53 Kan. 56, 35 Pac. Rep. 811; *Gordon v. Wansey*, 21 Cal. 77.

<sup>4</sup> *Livermore v. Truesdell*, 9 Colo.

App. 332, 48 Pac. Rep. 276; *Champney v. Coope*, 34 Barb. 539; *Collins v. Adams*, 53 Vt. 433; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 id. 153; *Adams v. Drake*, 11 Cush. 504; *Tuckerman v. Newhall*, 17 Mass. 581; *Chapman v. Collins*, 12 Cush. 163; *Pray v. Maine*, 7 id. 253; *Harbeck v. Vanderbilt*, 20 N. Y. 395, 398. See *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578.

If payment is made at the request of the maker the obligation is extinguished and an indorsement of it subsequently made by the payee is ineffectual. *Moran v. Abbey*, 63 Cal. 56; *Pearce v. Bryant Coal Co.*, 121 Ill. 590, 13 N. E. Rep. 561.

<sup>5</sup> Id.; *Moran v. Abbey*, 58 Cal. 167; *Gordon v. Wansey*, 21 id. 78; *Citizens' Bank v. Lay*, 80 Va. 436; *Rolf v. Wooster*, 58 N. H. 526.

It makes no difference that an attempt to transfer was made at the time of payment, and as a part of that transaction. *Wright v. Mix*, 76 Cal. 465, 18 Pac. Rep. 645.

If a note is deposited in a bank for collection a payment made by a guarantor, surety or the maker will discharge it. *Citizens' Bank v. Lay*, 80 Va. 436; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604; *Eastman v. Palmer*, 32 N. Y. 238; *Dooley v. Virginia F. & M. Ins. Co.*, 3 Hughes, 221.

ment actually made upon a debt, whether of the whole or a part, is a total or partial discharge, and cannot afterwards be changed except by mutual consent, and if other parties are interested, by their consent also.<sup>1</sup> Where marriage extinguishes a debt due from the wife to the husband it also discharges any lien by which the debt was secured, and the debt is not revived by a divorce.<sup>2</sup> As will more fully appear in another connection,<sup>3</sup> the payment of a debt due after suit brought will prevent the recovery of interest as damages,<sup>4</sup> though it would be otherwise if there had been a contract to pay interest.<sup>5</sup>

After a judgment recovered upon a paid debt, or without deducting payments, the sum paid cannot be recovered; payment in a strict sense is a defense, and if not used as such is lost.<sup>6</sup> The payments must be strictly such or definitely appropriated to the debt to have that effect.<sup>7</sup> Where a sum of money was delivered by the obligor to the obligee to be [353] credited by the latter upon the bond as part payment, and the obligee neglected to indorse or apply it and obtained judgment for the whole amount of the bond, the obligor was allowed to recover the money paid.<sup>8</sup> There was a special trust re- [354] posed in the defendant to credit the money on the bond and he had violated it. Where, however, there is a direct payment on a debt which is not evidenced by note, bond or writing of any kind; where no act beyond payment and receipt of it is necessary or contemplated to give effect to the payment, and the money is passed from the debtor to the creditor as payment at once, and not simply to become such on the doing of some act to evidence it, it is strict payment and cannot be

<sup>1</sup> Mead v. York, 6 N. Y. 449, 57 Am. Dec. 467; Marvin v. Vedder, 5 Cow. 671; Hawkins v. Stark, 19 Johns. 305; Frost v. Martin, 26 N. H. 422, 59 Am. Dec. 353; Miller v. Montgomery, 31 Ill. 350.

<sup>2</sup> Farley v. Farley, 91 Ky. 497, 16 S. W. Rep. 129.

<sup>3</sup> Ch. 8.

<sup>4</sup> Davis v. Harrington, 160 Mass. 278, 35 N. E. Rep. 771.

<sup>5</sup> Andover Savings Bank v. Adams, 1 Allen, 28.

<sup>6</sup> Loring v. Mansfield, 17 Mass. 394; Marriot v. Hampton, 7 T. R. 269; De Sylva v. Henry, 3 Port. 132; Eggleston v. Knickerbacker, 6 Barb. 458; Adams v. Barnes, 17 Mass. 365; Job v. Collier, 11 Ohio, 422; Seymour v. Lewis, 19 Wend. 512.

<sup>7</sup> See Hazen v. Reed, 30 Mich. 331; Judd v. Littlejohn, 11 Wis. 176.

<sup>8</sup> Woodward v. Hill, 6 Wis. 147; Fowler v. Shearer, 7 Mass. 14. See Wheeler v. Harrison, 28 Mich. 265.

recovered, though the debt is afterwards sued upon and judgment rendered for it without deducting the sum paid.<sup>1</sup> If payment has been made for a consideration which is subsequently withdrawn or withheld, the money may be recovered.<sup>2</sup>

"It is undoubtedly the rule that one partner may not appropriate the property or money of the firm to the payment of his own debt without the consent of his copartners, and that if he does so the property misapplied may be followed and recovered until it reaches the hands of a *bona fide* purchaser for value. But I think it is equally well settled that the payment of money to a creditor, who receives it in discharge of an existing debt innocently and without knowledge or means of knowledge that the debtor paying had no rightful ownership of the fund, is good and effectual, and does not subject the recipient to a recovery by the true owner."<sup>3</sup>

§ 219. **Payment before debt due.** The creditor is not obliged to receive a part payment,<sup>4</sup> but if he does it has the effect of partial satisfaction. Payment before the money is due is a payment at maturity.<sup>5</sup> If a creditor, however, receives money before it is due on a demand drawing interest such payment, in the absence of an agreement to the contrary, should be applied to the extinguishment of the principal.<sup>6</sup> And even when received upon the understanding that it was not to draw interest until the balance of the debt should be paid because the creditor used the money as his own it was held that it should be applied at the date of payment.<sup>7</sup> The holder of a note entitled to grace cannot be compelled to accept payment until the last day, to which interest should be computed.<sup>8</sup>

§ 220. **Payment by devise or legacy.** A devise or legacy will operate as payment when it is intended by the testator and accepted by the creditor as such.<sup>9</sup> A legacy to a creditor

<sup>1</sup> Driscoll v. Damp, 17 Wis. 419; Bronson v. Rugg, 39 Vt. 241.

<sup>2</sup> Mechanics & Traders' Ins. Co. v. McLain, 48 La. Ann. 1091, 20 So. Rep. 278.

<sup>3</sup> Newhall v. Wyatt, 139 N. Y. 452, 36 Am. St. 712, 34 N. E. Rep. 1045; Stephens v. Board of Education, 79 N. Y. 187, 35 Am. Rep. 511.

<sup>4</sup> Jennings v. Shriver, 5 Blackf. 37.

<sup>5</sup> Patten v. Fullerton, 27 Me. 58; Holmes v. Broket, Cro. Jac. 434.

See Roberts v. Wilkinson, 34 Mich. 129.

<sup>6</sup> Starr v. Richmond, 30 Ill. 276.

<sup>7</sup> Toll v. Hiller, 11 Paige, 228.

<sup>8</sup> Smith v. Merchants' & Farmers' Bank, 14 Ohio Ct. Ct., 199.

<sup>9</sup> Scheerer v. Scheerer, 109 Ill. 11; Rose v. Rose, 7 Barb. 174; Clarke v.



which is equal to or greater than his debt, and which is not contingent or uncertain, is presumed to be a satisfaction of the debt.<sup>1</sup> Courts, however, have given effect to slight circumstances, appearing on the face of the will or otherwise, by way of repelling the presumption of satisfaction.<sup>2</sup> And the rule is not allowed to prevail where the legacy is of less amount [355] than the debt, even as a satisfaction *pro tanto*; nor where there is a difference in the time of payment of the debt and the legacy; nor where they are of different natures as to subject-matter; nor where there is an express direction in the will for the payment of debts.<sup>3</sup> When a legacy is made by a creditor to a debtor and the debt is less in amount than the legacy, the legatee is considered as having so much of the assets in his hands as the debt amounts to and consequently to be satisfied *pro tanto*; and when the debt exceeds the legacy, the executors of the testator are entitled to retain the legacy in part discharge of the debt.<sup>4</sup> There is no presumption that a legacy given a creditor is in satisfaction of the debt if the testator is

Bogardus, 13 Wend. 67; Mulheran's Ex'r v. Gillespie, id. 349; Courtenay v. Williams, 3 Hare, 539; Voorhees v. Voorhees, 18 N. J. Eq. 227; Brokaw v. Hudson, 27 id. 135; Blair v. White, 61 Vt. 110, 17 Atl. Rep. 49; Brunn v. Schuett, 59 Wis. 260, 18 N. W. Rep. 260.

<sup>1</sup> Wescoe's Appeal, 52 Pa. 195; Eaton v. Benton, 2 Hill, 576; Cloud v. Clinkinbeard, 8 B. Mon. 398, 48 Am. Dec. 397; Strong v. Williams, 12 Mass. 392, 7 Am. Dec. 81; Williams v. Crary, 5 Cow. 368; 2 Story's Eq., § 1100; Fetrow v. Krause, 61 Ill. App. 238.

<sup>2</sup> Id. See Story's Eq., §§ 1100, 1101; Strong v. Williams, 12 Mass. 392; Willis v. Dun, Wright, 183; Byrne v. Byrne, 3 S. & R. 54, 8 Am. Dec. 641; 1 Pom. Eq., § 527. "There is no doubt the rule still nominally exists; but the tendency of the more recent decisions is to consider the bequest a bounty and not the discharge of an obligation. And the courts now lay hold of any circum-

stances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt." Crouch v. Davis, 23 Gratt. 62, 93. In another case it was observed: Inasmuch as the presumption is arbitrary and often in conflict with the real motives and wishes of the testator, and seemingly harsh, courts have been prompt to seize upon every circumstance to counteract and overcome it. Gilliam v. Brown, 43 Miss. 641. Both these cases are approved in Patten v. Glover, 1 D. C. App. Cas. 466, 480.

<sup>3</sup> Fetrow v. Krause, 61 Ill. App. 238; Van Riper v. Van Riper, 2 N. J. Eq. 1; Lisle v. Tribble, 92 Ky. 304, 12 S. W. Rep. 742; Gibbons v. Woodward, 3 Walker (Pa. Sup. Ct.), 303; Cloud v. Clinkinbeard, 8 B. Mon. 398, 48 Am. Dec. 397; Fort v. Gooding, 9 Barb. 371.

<sup>4</sup> Tinkham v. Smith, 56 Vt. 187; Clarke v. Bogardus, 12 Wend. 67. See Close v. Van Husen, 19 Barb. 505.

a joint debtor, or if the legacy is contingent.<sup>1</sup> Though no general rule was laid down a legacy has been declared not to be a satisfaction of a debt incurred after the will was made.<sup>2</sup> A bequest by a mother, indebted to her children as administratrix of the estate of their father and as their guardian, of a portion of her own estate, which is more than the amount of the indebtedness, is not to be regarded as a satisfaction of her indebtedness to them. But this rule does not apply to an advancement made by a father or other person *in loco parentis* to a child to whom he is indebted.<sup>3</sup>

§ 221. **Payment by gift inter vivos.** A creditor may extinguish a debt gratuitously by such acts as are equivalent to a gift consummated. Thus, indorsements made in consideration of kindness, by direction and in the presence of a mortgagee, of part payments upon a mortgage against his granddaughter and her husband, with whom he was living at the time, and which were to accord with his deliberate and expressed intention to make a gift or donation of his property to her, have been sustained as an extinguishment or forgiving of the mortgage debt to that extent. It was objected that, this being a gift *inter vivos*, delivery and acceptance were essential to its validity, and as there was in such a case no delivery it could not take effect. Christiancy, J., said: "Doubtless such is the rule where the gift consists of tangible personal property which admits of actual delivery; and the same rule would probably apply where the note or bond of a third person is the subject of the gift. Whether if the whole of the mortgage debt in the present case had been the subject, delivery of the note and mortgage, or one of them, would not have been essential we need not inquire. In the present case it was but a part of the sum secured by the note and mortgage; and the attempted donation was to the debtors themselves. And it is difficult to conceive how any delivery could have been made. But it is said that there must have been a delivery of the papers or of a release or receipt for the portion of the debt intended to be given; because without

<sup>1</sup> Gibbons v. Woodward, *supra*.

<sup>3</sup> Patten v. Glover, 1 D. C. App.

<sup>2</sup> Sullivan v. Latimer, 38 S. C. 158, 17 S. E. Rep. 701.

Cas. 466; Plunkett v. Lewis, 3 Hare, 316; 1 Pom. Eq., § 540.

something of this kind it would have been in the power of the donor to retract, and this he might doubtless have done if this had been an executory agreement or undertaking to make this gift. But here the purpose and intention of making the gift was fully executed, and by one of the donees actually accepted at the time; and the acceptance by the other of the extinguishment of a part of the debt against himself may be very safely presumed. And if it remained in the power of the donor to retract, it would have been equally so, if purely a gift, had a receipt been given, and equally so, for aught we can discover, had a release been given, there being no consideration and under our statute<sup>1</sup> which makes the seal no more than *prima facie* evidence of a consideration. The want of consideration could, therefore, in either case, have been shown. As the debt which was the subject of the gift, when considered with reference to the fact that the donee was the debtor, and that only part of the debt was attempted to be given, did not admit of actual delivery, and as all was done that could well be done under the circumstances to make the gift effectual, we do not think the act and intention of the donor should be defeated merely because the subject did not admit of an actual or technical delivery.”<sup>2</sup>

A delivery is so essential to the validity of a gift that its place cannot be supplied by a formal declaration of the donor's executory intention, although in writing.<sup>3</sup> The intention to discharge by gift a debt in the form of a note, bond or the like should be executed by an actual surrender of the instrument or by a release delivered to the donee.<sup>4</sup> The delivery of a note by the holder to the maker, with the intention of transferring

<sup>1</sup> Comp. L. of Mich. 1871, § 5947.

<sup>2</sup> Green v. Langdon, 28 Mich. 221.

<sup>3</sup> Plumstead's Appeal, 4 S. & R. 545; Wheatley v. Abbott, 32 Miss. 343; Hunter v. Hunter, 19 Barb. 631; Noble v. Smith, 2 Johns. 52, 3 Am. Dec. 399; Cook v. Husted, 12 Johns. 188; Davis v. Boyd, 6 Jones, 249; Brunn v. Schuett, 59 Wis. 260, 18 N. W. Rep. 260.

<sup>4</sup> Kidder v. Kidder, 33 Pa. 268; Campbell's Estate, 7 id. 100, 47 Am. Dec. 503; Wentz v. Dehaven, 1 S. &

R. 312; Whitehill v. Wilson, 3 P. & W. 405; Duffield v. Elwes, 1 Bligh (N. S.), 497; Duffield v. Hicks, 1 Dow & Clark, 11; Lacey v. Lacey, 7 Pa. 251, 47 Am. Dec. 513; 1 Smith's Lead. Cas. 1st pt. \*469.

In Campbell's Estate, *supra*, Gibson, C. J., said that “the gift of a bond, note or other chattel cannot be made by words *in futuro* or in words *in presenti*, unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable.”

to him the title thereto, is an extinguishment of the note and a discharge of the obligation to pay it.<sup>1</sup>

[357] § 222. **Payment by retainer.** Payment or satisfaction of a debt may result as the legal effect of the debtor having conferred on him in some character the duty or right to receive payment. This conclusion rests upon the ground that when the same hand is to pay and receive the money, that which the law requires to be done shall be deemed to be done; and, therefore, that such debt, when due from an administrator, for instance, shall be assets *de facto* to be accounted for in the probate account.<sup>2</sup> But the principle only applies where it is shown that the personal representative had sufficient personal assets for the payment of his debt which he could have applied for that purpose.<sup>3</sup> When a testator makes his debtor executor it is a release at law, but the former may reserve the debt, and payment be enforced by the party to whom it is bequeathed under the fiction of a promise to him.<sup>4</sup> Such appointment does not extinguish the debt, nor a mortgage security for it,<sup>5</sup> but it becomes assets in his hands,<sup>6</sup> especially if there is a deficiency, to pay debts.<sup>7</sup> An executor or other trustee for the distribution of moneys to pay debts, legacies, etc., may retain for a debt owing him from the trust funds, and may also retain for the benefit of the trust any sum due from a beneficiary. A personal representative may retain for his debt by withholding within the period allowed by the statute of lim-

Brunn v. Schuett, 59 Wis. 260, 18 N. W. Rep. 260.

<sup>1</sup> Slade v. Mutrie, 156 Mass. 19, 30 N. E. Rep. 168; Stewart v. Hidden, 13 Minn. 43; Ellsworth v. Fogg, 35 Vt. 355; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Jaffray v. Davis, 124 N. Y. 164, 170, 26 N. E. Rep. 351, 11 L. R. A. 710; Patten v. Glover, 1 D. C. App. Cas. 466, 481.

<sup>2</sup> Ipswich Manuf. Co. v. Story, 5 Met. 310; Stevens v. Gaylord, 11 Mass. 255; Kinney v. Ensign, 18 Pick. 232; Winship v. Bass, 12 Mass. 199; Wankford v. Wankford, 1 Salk. 299; Cheetham v. Ward, 1 B. & P. 630; Freakley v. Fox, 9 B. & C. 130;

Taylor v. Deblois, 4 Mason, 131; Bryant v. Smith, 10 Cush. 169; Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec. 616, 15 Pick. 54, 1 Allen, 153. See Ilsley v. Jewett, 2 Met. 168; Wilson v. Wilson, 17 Ohio St. 150, 91 Am. Dec. 125.

<sup>3</sup> Jordan v. Hardie, 131 Ala. 72, 31 So. Rep. 504; Miller v. Irby, 63 Ala. 485.

<sup>4</sup> Fishel v. Fishel, 7 Watts, 44.

<sup>5</sup> Bacon v. Fairman, 6 Conn. 121; Collard v. Donaldson, 17 Ohio, 264. See Pratt v. Northam, 5 Mason, 95; Miller v. Irby, 63 Ala. 477.

<sup>6</sup> Winship v. Bass, 12 Mass. 198.

<sup>7</sup> Marvin v. Stone, 2 Cow. 781.

itations a sufficient amount from the moneys coming to his hands, and is entitled to due credit therefor in the settlement of his accounts,<sup>1</sup> on such proof as would authorize a recovery upon it.<sup>2</sup> And such retainer will be presumed from sufficient assets coming into his hands which were susceptible of conversion into money.<sup>3</sup> His debt, however, will not be deemed extinguished by the receipt of assets sufficient to dis- [358] charge it, but which he fails to reduce to money and turn over to his successor.<sup>4</sup> The right of retainer, and the legal incidents thereof, applies to debts due the personal representative as trustee, or as executor or administrator of another person.<sup>5</sup> An executor *de son tort* cannot retain for his own debt.<sup>6</sup>

Sureties in a bond who pay it off after the death of the principal are entitled to rank as his specialty creditors, and if they be administrators of his estate may retain whatever they pay on account of such suretyship out of assets that come to their hands as administrators against other specialty creditors.<sup>7</sup> A retainer may either be pleaded or given in evidence under the plea of *plene administravit*.<sup>8</sup>

§ 223. **Payment in counterfeit money, bills of broken banks or forged notes.** It accords with principles governing in like cases, and certainly with the decided weight of authority, to hold that the party paying by legal implication warrants the genuineness of what he pays as money,<sup>9</sup> unless the character of the transaction or the accompanying circumstances show a different intention.<sup>1</sup> This rule is now recog-

<sup>1</sup> *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707; *Hamner v. Hamner*, 3 Head, 398; *Harrison v. Henderson*, 7 Heisk. 315.

<sup>2</sup> *Kirksey v. Kirksey*, 41 Ala. 626.

<sup>3</sup> *Glenn v. Glenn*, 41 Ala. 571.

<sup>4</sup> *Harrison v. Henderson*, 7 Heisk. 315; *Ross v. Wharton*, 10 Yerg. 190.

<sup>5</sup> *Miller v. Irby*, 63 Ala. 477; *Thompson v. Cooper*, 1 Call, 861, 1 Am. Dec. 509; *Thomas v. Thompson*, 2 Johns. 471; *Hosack v. Rogers*, 6 Paige, 415; *Morrow v. Payton*, 8 Leigh, 54.

<sup>6</sup> *Turner v. Child*, 1 Dev. 331.

<sup>7</sup> *Powell's Ex'r v. White*, 11 Leigh, 309. See *Copis v. Middleton*, 1 Turn.

& *Russ*. 224; *Jones v. Davids*, 4 Russ. 277.

<sup>8</sup> *Evans v. Norris*, Hayw. (by Batt.) 473.

<sup>9</sup> *Watson v. Cresap*, 1 B. Mon. 195, 36 Am. Dec. 572; *Edmunds v. Digges*, 1 Gratt. 359, 42 Am. Dec. 561; *Hargrave v. Dusenbury*, 2 Hawks, 326; *Fogg v. Sawyer*, 9 N. H. 365; *Buck v. Doyle*, 4 Gill, 478, 45 Am. Dec. 176; *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281.

<sup>1</sup> See *Dakin v. Anderson*, 18 Ind. 52. In *Orchard v. Hughes*, 1 Wall. 73, it was held to be no defense to a suit for debt that the debt arose from the

nized as an exception to that of *caveat emptor*, but it is evident it was not always so.<sup>1</sup> This warranty of genuineness, how-[359] ever, is not absolute; but the general current of authority is that the payer warrants the quality to such an extent that he is bound to make it good, if found bad, and is returned within a proper time.<sup>2</sup> It is a special warranty, requiring the return of the thing warranted and involving an obligation of the debtor to pay the amount again in good money; but leaving the creditor, of course, the option, on returning the spurious money, to proceed on the *statu quo* as upon a rescission. The payment in either case, to the extent of the counterfeit money, is treated as a nullity when it has been restored.<sup>3</sup>

The same principle applies to the notes of individuals. If

receipt of the bills of a bank chartered illegally, and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; they themselves having been actually current at the time the defendant received them, and not having proved worthless in *his* hands, and he not being bound to take them back from the person to whom he paid them.

<sup>1</sup> In *Wade's Case*, 5 Coke, 114a, it was said: "It was adjudged between Vare and Studley that when the lessor demanded rent of the lessee, according to the condition of re-entry, and the lessee payeth the rent to his lessor, and he received it and put it in his purse, and afterwards in looking it over again at the same time he found amongst the money that he had received some counterfeit pieces and thereupon refused to carry away the money, but re-entered for the condition broken, it was adjudged the entry was not lawful; for when the lessor had accepted the money it was at his peril, and upon that allowance he shall not take exception to any part of it." And it is said in *Shepherd's Touchstone*, 140, in respect to mortgages: "If the payment be made, part of it with counterfeit coin, and the party accept and

put it up, this is a good payment, and consequently a good performance of the condition."

<sup>2</sup> *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *Wingate v. Neidlinger*, 50 Ind. 520; *Samuels v. King*, id. 527; *Stebbins v. Stebbins*, 51 Ind. 595. See *Alexander v. Byers*, 19 Ind. 301.

<sup>3</sup> Id.; *Markle v. Hatfield*, 2 Johns. 453; *Gilman v. Peck*, 14 Vt. 516; *Thomas v. Todd*, 6 Hill, 340; *Torrey v. Baxter*, 13 Vt. 452; *Pindall's Ex'r v. Northwestern Bank*, 7 Leigh, 617; *Raymond v. Baar*, 13 S. & R. 318, 15 Am. Dec. 603; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188.

In *Watson v. Cresap*, 1 B. Mon. 195, 36 Am. Dec. 572, Judge Ewing said: "It must be presumed that he who passes a bill as money passes it as genuine, and the law implies an *assumpsit* or warranty that it is so (2 Johns. 458, 15 Johns. 241); and if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach; nor does it matter whether he who passes it knows that it is counterfeit or not. 2 Johns., *supra*. The action is not an action for fraud, but for breach of promise implied by

they are forged, in whole or in part, or are void because of the incapacity of their makers, the paper does not discharge the debt it was accepted in payment of.<sup>1</sup> A contract to receive payment in certificates of indebtedness issued by public officers contemplates that the instruments shall be enforceable; that they shall rest upon antecedent proceedings which gave the officers jurisdiction to issue them.<sup>2</sup>

law. And to sustain this form of declaring it would certainly be unnecessary to prove that the note was tendered back, as it goes for breach of promise, and not for restitution of the consideration upon a disaffirmance of the contract of payment. As the first count in the case under consideration is a count on the implied promise, the proof justified the recovery without any evidence that the bill was tendered back to the defendants before suit brought. We are also satisfied that if money or other bills which pass and are received as money be the consideration given for a counterfeit bill, that it may be recovered back on an *indebitatus* count for so much money had and received. Payment for such a bill must be regarded as a payment by mistake for a thing of no value, but which was, at the time it was received, believed to be, and imported on its face to be, of intrinsic worth. 2 Johns. 458.

"But this form of declaring proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. It is an equitable remedy, and to entitle the plaintiff to recovery, if anything of value has been received, it must be shown that it was tendered back before the action was brought. A counterfeit bill is certainly of no intrinsic value; it would be as worthless in the hands of the defendants as that of the plaintiffs, and according to the rule laid down, it would seem unnecessary to show

that it was tendered back, even in this form of declaring. But whether it was or not it is not now necessary to determine, as the recovery was proper on the first count."

This case, it is respectfully suggested, would not now be regarded as correctly decided, for it proceeds upon a ground fundamentally erroneous; namely, that a counterfeit bill "would be as worthless in the hand of the defendants as in that of the plaintiffs." An absolute warranty of genuineness is assumed doubtless on that theory. The consideration appears to have been overlooked that where a counterfeit bill has been innocently paid and received, the prompt return of it will enable the party who had paid it to restore it to the person from whom he received it, and thus obtain its nominal amount in good money. The implied warranty requires such restitution.

<sup>1</sup> Godfrey v. Crisler, 121 Ind. 203, 22 N. E. Rep. 999; First Nat. Bank v. Buchanan, 87 Tenn. 32, 2 S. W. Rep. 202, 10 Am. St. 617; School Town of Monticello v. Grant, 104 Ind. 168, 1 N. E. Rep. 302; Gerwig v. Sitterly, 56 N. Y. 214; Stratton v. McMakin, 84 Ky. 641, 4 Am. St. 215; Ritter v. Singmaster, 73 Pa. 400; Graham's Estate, 14 Phila. 280; Emerie v. O'Brien, 36 Ohio St. 491; Guichard v. Brande, 57 Wis. 534, 15 N. W. Rep. 764; Sandy River Nat. Bank v. Miller, 82 Me. 137, 19 Atl. Rep. 109.

<sup>2</sup> Catlin v. Munn, 37 Hun, 23.

[360] The tendency of modern decisions is to require reasonable vigilance in the receipt and prompt diligence in the return of counterfeits, or in giving notice to the payer that he may protect himself against prior parties. What is diligence is determined with reference to the facts of each case, but upon analogies drawn from the law of commercial paper. A delay of months or even a few days may be fatal to the right of recourse to the payee.<sup>1</sup> Any unnecessary delay beyond such reasonable time as would enable the taker to inform himself as to its genuineness operates as a fraud on the payer, and prevents a recovery.<sup>2</sup>

[361] § 224. *Same subject.* When payment is made in the bills of insolvent banks or in other depreciated conventional currency, the question of who should bear the loss may arise [362] under various circumstances. If both parties deal in the currency in question as uncurrent money it is like dealing in a commodity. And if a debtor pays as money bank notes, [363] knowing the bank to be insolvent, and conceals it from the creditor or payee, it will be deemed a fraud.<sup>3</sup> But there are various aspects in which an innocent payment of depreciated or worthless currency may be viewed; that is, though both the payer and receiver take for granted it is good, and may be equally ignorant of any fact tending to lessen its value: first, the bank may be in fact insolvent, but had not stopped payment; second, it may have stopped payment, but a knowledge of it not have reached the neighborhood where the payment was made, and the bills may have continued there actually current; third, the currency used may be wholly worthless or

<sup>1</sup> *Raymond v. Baar*, 13 S. & R. 318; *Bank v. Gloucester Bank*, 17 id. 1, *Samuels v. King*, 50 Ind. 527; *Thomas* 28, 9 Am. Dec. 111.

*v. Todd*, 6 Hill, 340; *Lawrenceburgh Nat. Bank v. Stevenson*, 51 Ind. 594; *Corn Exchange Nat. Bank v. National Bank*, 78 Pa. 233; *Kenny v. First Nat. Bank*, 50 Barb. 112; *Camidge v. Allenby*, 6 B. & C. 373; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141; *Pindall's Ex'r v. Northwestern Bank*, 7 Leigh, 617; *Union Bank v. Baldenwick*, 45 Ill. 375; *Pumphrey v. Eyre*, Tappan, 283. See *Young v. Adams*, 6 Mass. 187; *Salem*

<sup>2</sup> *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219. This case is valuable because of the ability and learning with which Judge Campbell discusses the legal relations between the payer and receiver of counterfeit money. See *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *Simms v. Clark*, 11 Ill. 137; *United States Bank v. Bank of Georgia*, 10 Wheat. 233.

<sup>3</sup> *Story on Prom. Notes*, § 118.



only depreciated. Mr. Chitty says: "It should seem that if in discounting a note or bill the promissory note of country bankers be delivered, after they have stopped payment, but unknown to the parties, the person taking, unless guilty of laches, might recover the amount of the discounter because it must be implied that at the time of the transfer the notes were capable of being received if duly presented for payment."<sup>1</sup> And Mr. Story says of a payment in bills of an insolvent bank, where both parties are equally innocent, and alike ignorant that the bank had become insolvent, that the weight of reasoning and of authority seems to be in favor of the payer bearing the loss. The decisions in New York,<sup>2</sup> Wisconsin,<sup>3</sup> Vermont,<sup>4</sup> New Hampshire,<sup>5</sup> Illinois,<sup>6</sup> Maine,<sup>7</sup> South Carolina,<sup>8</sup> and Ohio<sup>9</sup> are in accord with that doctrine. But in Pennsylvania,<sup>1</sup> Tennessee,<sup>2</sup> and Alabama,<sup>3</sup> it has been held that such loss should be borne by the receiver.<sup>4</sup>

The failure of a bank has the effect of depriving its bills of the distinctive character of money; it becomes insolvent when

<sup>1</sup> Chitty on Bills, 247.

<sup>2</sup> Lightbody v. Ontario Bank, 11 Wend. 9, affirmed, 13 id. 101; Houghton v. Adams, 18 Barb. 545.

<sup>3</sup> Townsends v. Bank of Racine, 7 Wis. 185.

<sup>4</sup> Gilman v. Peck, 11 Vt. 516, 34 Am. Dec. 702; Wainwright v. Webster, 11 Vt. 576, 34 Am. Dec. 707.

<sup>5</sup> Fogg v. Sawyer, 9 N. H. 365, 25 Am. Dec. 462.

<sup>6</sup> Magee v. Carmack, 13 Ill. 289.

<sup>7</sup> Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284.

<sup>8</sup> Harley v. Thornton, 2 Hill, 509.

<sup>9</sup> Westfall v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509. But see Imbush v. Mechanics' Bank, 1 West. L. J. 49.

<sup>1</sup> Bayard v. Shunk, 1 W. & S. 94, 37 Am. Dec. 441.

<sup>2</sup> Scruggs v. Gass, 8 Yerg. 175, 29 Am. Dec. 114. But see Ware v. Street, 2 Head, 609, 75 Am. Dec. 755.

<sup>3</sup> Lowrey v. Murrell, 2 Port. 282, 27 Am. Dec. 651.

<sup>4</sup> See Young v. Adams, 6 Mass. 182; Edmunds v. Digges, 1 Gratt. 329; Phillips v. Blake, 1 Met. 156; Cambridge v. Allenby, 6 B. & C. 373; Owen-son v. Morse, 7 T. R. 64; Ex parte Blackburne, 10 Ves. 204; Emly v. Lye, 15 East, 7.

In Corbit v. Bank of Smyrna, 2 Harr. 235, 30 Am. Dec. 635, it was held that the receipt by a bank for deposit as money of the bills of a bank that had just suspended, but before either the bank or the depositor was informed of the failure, was at the risk of the bank receiving them. And a distinction was taken between the receipt of bank bills for a contemporaneous debt or consideration and receiving them for a precedent debt. In the former case the bills are supposed to be the thing bargained for, and therefore at the risk of the receiver; but when received for a precedent debt it is not discharged unless the bills are of solvent banks when received.

it ceases to redeem them with legal tender money.<sup>1</sup> Bank notes are the representative of money, and circulate as such by general consent and usage. But this consent and usage are based upon the convertibility of such notes into coin at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed and the inability to redeem its bills is openly averred, they instantly lose that character,<sup>[365]</sup> their circulation as currency ceases with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place the loss must necessarily fall upon him who is the owner of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance can give him no right to throw the loss he has already incurred upon an innocent third party.<sup>2</sup> Therefore, if such bills, after failure of the bank, are paid out and received as money by persons ignorant of the fact, the receiver is entitled to return them and require their amount in good money on the ground of mistake.<sup>3</sup> The very time when a bank announces its failure, by closing its doors and ceasing to redeem, is that at which its failure is deemed to occur, without reference to its antecedent real condition, between parties having no cause to anticipate that event.<sup>4</sup> The doctrine that the loss falls upon him in whose

<sup>1</sup> Townsends v. Bank of Racine, 7 Wis. 185; Lightbody v. Ontario Bank, 11 Wend. 9, 13 id. 101.

<sup>2</sup> Westfall v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509.

<sup>3</sup> Id.; Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284; Roberts v. Fisher, 43 N. Y. 159, 3 Am. Rep. 680; Leger v. Bonnaffe, 2 Barb. 475; Baldwin v. Van Deusen, 37 N. Y. 487.

<sup>4</sup> Ware v. Street, 2 Head, 609, 75 Am. Dec. 755. In this case a payment in bank bills was made on the 12th of July, 1858, late in the evening and was held good, although the sus-

pension was resolved upon that same evening, but was not announced until the next day. The court say: "The loss must fall upon one of two innocent men, and the law must control it. At the time the payment was made the notes were circulating as currency and considered good by the community. But they were in fact of no value at the hour they were paid out, although a few hours before they were convertible into specie. . . . The supposed commercial interest of our country and the general convenience of the

hands the bills are at the time of the failure necessarily [366] involves an implied guaranty in every payment of bank bills that at that time the bank has not suspended or failed, unless a contrary intention is manifested.

On the contrary, in Pennsylvania and some other states, as before stated, where a payment in bank bills is made in good faith their acceptance is not deemed to be upon the faith of any such guaranty, but is governed by the rule of *caveat emptor*, and the maxim of *melior est conditio defendentis*.<sup>1</sup>

people have produced a course of legislation by which bank paper has become the circulating medium and the standard of value instead of specie. True, it has not been made a lawful tender and cannot be without a change of the constitution. But by almost universal consent it has become the medium of exchange and the representative of property. It has taken the place of the precious metals and is regarded as money. This, however, is by consent and not by law. No man is *bound* to receive it in payment of debts or for property. But if it gets into his hands by consent, and a loss comes by failure of the bank, the misfortune must and should be his in whose hands it happens to be at the time. The risk must follow the paper and not the former owners. It passes from hand to hand without recourse except in cases of fraud or concealment."

<sup>1</sup> In *Bayard v. Shunk*, 1 W. & S. 92, 37 Am. Dec. 441, Gibson, C. J., expounds and enforces this view with great vigor of language and logic. He says: "Cases in which the bills and notes of a third party were transferred for a debt are not to the purpose; and most of those which have been cited are of that stamp. Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt

contracted at the time, the presumption is that they were received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank notes, though they are of the same mould and obligation betwixt the original parties, is regulated by peculiar principles, and stands on a different footing. They are lent by the banks as cash; they are paid away as cash; and the language of Lord Mansfield in *Miller v. Race*, 1 Burr. 452, was not too strong when he said. 'they are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments is money or cash.' If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young v. Adams*, 6 Mass. 182, that our bank notes are private contracts without a public sanction like that

[367] Where recourse is allowed to the party who paid out the bills it does not depend on their being worthless. Parker, C. J., said: "The case of a payment in bills of a broken bank cannot be distinguished in principle from a payment in coun-

which gives operation to the lawful money of the country; but it is also true that they pass for cash, both here and in England, not by force of any such sanction, but by the legislation of general consent, induced by their great convenience, if not the absolute necessities of mankind. *Miller v. Race* is a leading case which has never been doubted in England, or, except in a case presently to be noticed, in America; and it goes very far to rule the point before us; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from impurities in the medium which keeps it in motion, except those which, few and far between, are occasioned by forgery, bank notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point is (1841) decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt. . . . *Camidge v. Allenby*, 6 B. & C. 373; *Scruggs v. Gass*, 8 Yerg. 175, 29 Am. Dec. 114; *Young v. Adams*, 6 Mass. 182; against *Lightbody v. Ontario Bank*, 11 Wend. 9, affirmed, 13 id. 101. . . .

"To assume that the solvency of the bank at the time of the transfer is an inherent condition of it is to assume the whole ground of the argument. The conclusion concurred in by all, however, was that the medium must turn out to have been what the debtor offered it for at the time of payment. How does that consist with the equitable principle that there must be, in every case, a motive for the interference of the

law, but that it must be stronger than any to be found on the other side; else the equity being equal, and the balance inclining to neither side, things must be left to stand as they are (*Fonb. B. 1, ch. V, § 3; id. ch. IV, § 25*); in other words, that the law interferes not to shift a loss from one innocent man to another equally innocent, and a stranger to the cause of it. The self-evident justice of this would be proof, were it necessary, that it is a principle of the common law. But we need go no further in search of authority for it than *Miller v. Race*, in which one who had received a stolen bank note for full consideration in the course of his business was not compelled to restore it. It was intimated in the *Ontario Bank v. Lightbody* that there was a preponderance of equity in that case, not on the side of him who had lost the note, but of him who had *last* given value for it. Why *last*? The maxim, *prior in tempore potior in jure*, prevails between prior and subsequent purchasers indifferently of a legal or an equitable title. It is for that reason the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for everything which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it. But general convenience requires that he should not; and it was that principle, not any consideration of the equities betwixt the parties, which ruled the case of *Miller v. Race*. But a more forcible illustration of the principle, were the case indisputably law, might be had in *Levy v. Bank of the United*

terfeit money. From the time of the failure of the bank they cease to be the proper representatives of money, whether they are at the time near to or at a distance from the [368] bank. They may have a greater value than counterfeit bills,

States, 4 Dall. 234, 1 Bin. 27, in which the placing even a forged check to the credit of a depositor as cash—a transaction really not within any principle of conventional law—was held to conclude the bank; and to this may be added the entire range of cases in which the purchaser of an article from a dealer has been bound to bear a loss from a defect in the quality of it. And for the same reason that the law refuses to interfere between parties mutually innocent, it refuses to interfere between those who are mutually culpable; as in the case of an action for negligence. What is there, then, in the case before us to take it out of this great principle of the common law? The position taken by the courts of New York is that every one who parts with his property is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in precious stones, if such is the bargain. But where he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to anything else is at an end. Bills of exchange and promissory notes enter not into the transactions of commerce as money; but it impresses even these with qualities which do not belong to ordinary securities. The holder of one of them, who has taken it in the ordinary course, can recover on it, whether there was a consideration between the original parties or not. . . .

“The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away can be conceded no

farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of whole communities at their nominal value when notoriously below it. But why hold the payer responsible for the failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it closed to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of mortal disease in him might refuse to pay for him though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction. It is no answer that the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the meantime, or it may stop at the instant of presentation when situated where the holder resides. And it may do so when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction

but in neither case has the party received what in the contemplation of both parties he was entitled to receive, if the contract was to pay a certain sum. In neither case has he received money or its representative. The sum contracted to [369] be paid has not been paid in money or anything which by usage passes as money, or which was entitled at the time to represent it; and the party has therefore failed to pay

between previous and subsequent failure evinced by stopping before the time of the transaction or after it is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground.

. . . The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it in all beside to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual or at least a potential existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a *nonentity*. It is no more a bank note than a dead horse is a living one; and it is an elementary principle, that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and a legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved, and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. . . . The difference between forgery and

insolvency in relation to a bank note is as distinctly marked as the difference between title and quality in relation to the sale of a chattel.

"What then becomes of the boasted principle that a man shall not have parted with his property until he shall have had value, or rather what he expected for it? Like many others of the same school, it would be too refined for our times, even did a semblance of justice lie at the root of it. But nothing devised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done, in any case, is no more than an approximation to it; and when the incidental risks of a business are so disposed of as to consist with the general convenience, no injustice will in the end be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. But nothing can be more exactly balanced than the equities of parties to a payment in regard to the risk of the medium when its worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair or any other infinitesimal quantity that can be imagined; and in such a case the common law allows a loss from mutual mistake to rest where it has fallen, rather than to remove it from the shoulders of one innocent man to the shoulders of another equally so."

what he contracted to pay. Counterfeit coin may contain a portion of good metal and thus have some value, but this would not make it a good medium of payment. Entire worthlessness, or not, is not, therefore, the criterion."<sup>1</sup> A [370] return of such paper by the receiver is required as a condition of the right to recover from the payer; and the necessity of returning it arises from the same considerations in the case of counterfeit money, to enable the party paying to secure himself with prior parties. But whether the rule requiring return within a reasonable time is confined to cases in which the payer has recourse does not appear to be decided. If the failure occurred while he was the owner of the bills he has no recourse; and if they are not returned why may not the party receiving and retaining them be charged with their value and the recovery be limited to the depreciation?<sup>2</sup>

§ 225. **Payment by note, bill or check.** A creditor may receive anything of value as payment.<sup>3</sup> A debtor, by agreement with his creditor, may pay his contemporaneous or antecedent debt in a note or bill against a third person; but there must be a mutual agreement that it shall be transferred and received as final satisfaction without recourse or condition of being productive.<sup>4</sup> Where goods are sold for a particular [371]

<sup>1</sup> *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Magee v. Carmack*, 13 Ill. 289.

<sup>2</sup> *Townsend v. Bank of Racine*, 7 Wis. 185; *Ontario Bank v. Lightbody*, 13 Wend. 104.

In *Magee v. Carmack*, 13 Ill. 289, the court remark as to the question of what is a reasonable time: "When from the nature of the subject a general rule can be applied to all cases, then what constitutes reasonable notice may be a question of law for the court, as notice to the indorser of a bill or note. But when, as in this case, the question of what would constitute a reasonable time must depend upon the peculiar circumstances of each case, and cannot reasonably be subjected to any general rule, then it is a question of fact

for the jury to be determined from all the circumstances."

<sup>3</sup> *Louden v. Birt*, 4 Ind. 566; *Reed v. Bartlett*, 19 Pick. 273; *Tilford v. Roberts*, 8 Ind. 254.

<sup>4</sup> *St. John v. Purdy*, 1 Sandf. 9; *New York State Bank v. Fletcher*, 5 Wend. 85; *Conkling v. King*, 10 N. Y. 440, affirming 10 Barb. 372; *Roberts v. Fisher*, 53 Barb. 69; *Wright v. First Crockery Ware Co.*, 1 N. H. 281, 8 Am. Dec. 68; *Jaffrey v. Cornish*, 10 N. H. 505; *Elliot v. Sleeper*, 2 id. 527; *Randlet v. Herren*, 20 id. 102; *Brewer v. Branch Bank*, 24 Ala. 440; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634; *Hart v. Boller*, 15 S. & R. 162, 16 Am. Dec. 536; *Citizens' Bank v. Carson*, 32 Mo. 191; *Smith v. Owens*, 21 Cal. 11; *Graves v. Friend*, 5 Sandf. 568.

note it is an exchange or barter, and the note has the effect of payment.<sup>1</sup> In some states the rule is that the note of the vendee is presumed to have been taken by the vendor in payment of a contemporaneous debt unless the contrary be shown or the note be void or there has been fraud or misrepresentation respecting it;<sup>2</sup> but it is otherwise as to an antecedent debt.<sup>3</sup> And when the note of a third person is taken without recourse, by indorsement or otherwise, for goods sold at the time, the presumption is it is taken in payment.<sup>4</sup> There is no dissent from the proposition that an agent who has no authority to sell property and receive payment for his principal is not presumed to be empowered to take anything but money in payment therefor;<sup>5</sup> and this is true of an agent who is appointed to receive and collect demands due his principal.<sup>6</sup> This

<sup>1</sup> *Ferdon v. Jones*, 2 E. D. Smith, 106; *Whitbeck v. Van Ness*, 11 Johns. 409, 6 Am. Dec. 383; *Breed v. Cook*, 15 Johns. 241; *Rew v. Barber*, 3 Cow. 272.

A creditor who accepts from his debtor notes of third persons which were to be received as payment if the former approves them is bound to determine whether they are to be so received or not within a reasonable time and to give his debtor notice of his decision. If he delays for forty days it is for the jury to find whether he has accepted them as payment. *Acme Harvester Co. v. Axtell*, 5 N. D. 315, 65 N. W. Rep. 680.

<sup>2</sup> *Ford v. Mitchell*, 15 Wis. 308; *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. Rep. 694.

<sup>3</sup> *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. Rep. 762.

<sup>4</sup> *Challoner v. Boyington*, *supra*; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. Rep. 374, 5 L. R. A. 802, reversing 40 Hun, 578; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397; *Corbit v. Bank of Smyrna*, 2 Harr. 235, 239, 30 Am. Dec. 635; *Torry v. Hadley*, 27 Barb. 192; *Whitbeck v. Van Ness*, 11

*Johns*. 409, 6 Am. Dec. 383; *Noel v. Murray*, 13 N. Y. 167; *Rew v. Barber*, 3 Cow. 272; *Breed v. Cook*, 15 Johns. 241; *Bank of England v. Newman*, 1 Ld. Raym. 442; *Bayard v. Shunk*, 1 W. & S. 92, 37 Am. Dec. 441; *Fydel v. Clark*, 1 Esp. 447; *Clark v. Muddall*, 1 Salk. 124. But see *Darnall v. Morehouse*, 36 How. Pr. 511; *Turner v. Bank of Fox Lake*, 3 Keyes, 425; *Youngs v. Stahelin*, 34 N. Y. 258; *Owenson v. Morse*, 7 T. R. 64; *Burrows v. Bangs*, 34 Mich. 304; *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Van Cleef v. Therasson*, 3 Pick. 12; *Carroll v. Holmes*, 24 Ill. App. 453, and a *dictum* in *Morrison v. Smith*, 81 Ill. 221.

<sup>5</sup> *Runyon v. Snell*, 116 Ind. 164, 18 N. E. Rep. 522, 9 Am. St. 839; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265; *Quinn v. Sewell*, 50 Ark. 380, 8 S. W. Rep. 132.

If the principal ships goods sold by the agent for other than a cash consideration the contract of sale is ratified. *Billings v. Mason*, 80 Me. 496, 15 Atl. Rep. 59.

<sup>6</sup> *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. Rep. 265; *Cooney v. United States Wringer Co.*, 101 Ill. App. 468; *Mor-*



view is qualified in Kentucky as to banks which are intrusted with collections if their usage is to accept checks in payment of claims, whether the customer has knowledge of the usage or not, if he has not given directions as to the mode of payment.<sup>1</sup> But this view is denied in Missouri.<sup>2</sup> A government revenue collector has no authority to receive in payment for stamps anything but money.<sup>3</sup>

Whether the receipt by the creditor of the debtor's note, or the note of one of several debtors, with the agreement that it is received at the risk of the creditor and as full satisfaction, will have the effect to extinguish the debt, is not universally agreed. In New York it has been several times held, and perhaps the doctrine there may be deemed settled, that a debtor's note, although expressly received as satisfaction, cannot extinguish his precedent debt.<sup>4</sup>

*ris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 So. Rep. 11; *McCormick Harvesting Machine Co. v. Breen*, 61 Ill. App. 528; *National Bank v. Grimm*, 109 N. C. 93, 13 S. E. Rep. 867; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. 479, 20 L. R. A. 780, 55 N. W. Rep. 631; *Sandy River Bank v. Merchants & Mechanics' Bank*, 1 Biss. 146; *Western Brass Manuf. Co. v. Maverick*, 4 Tex. Civ. App. 535, 23 S. W. Rep. 728; *Everts v. Lawther*, 165 Ill. 487, 46 N. E. Rep. 233; *Lawther v. Everts*, 63 Ill. App. 432; *Scully v. Dodge*, 40 Kan. 395, 19 Pac. Rep. 807; *McCormick v. Peters*, 24 Neb. 70, 37 N. W. Rep. 927; *Nicholson v. Pease*, 61 Vt. 534, 17 Atl. Rep. 720; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Wilcox & W. Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. Rep. 228; *Deatherage v. Henderson*, 43 Kan. 684, 23 Pac. Rep. 1052; *Mitchell v. Printup*, 68 Ga. 675.

If the agent of a mortgagee accepts a certificate of deposit in payment of a mortgage and deposits it in the bank which issued it to the credit of his own account, the payment is of cash. *Harrison v. Legore*, 109 Iowa, 618, 80 N. W. Rep. 670;

*Hare v. Bailey*, 73 Minn. 409, 76 N. W. Rep. 213.

It seems that an attorney, acting in good faith, has broader powers than other agents. It has been ruled where an attorney, under his employment, obtained judgment and presented a certified transcript of it to the defendant, demanding payment, which was made in confederate funds in 1862, that such payment was binding, and that payment in such funds, they being current, to clerks, sheriffs and other officers authorized to collect money, was binding on the creditor, while it was otherwise as to payments so made to private agents. *East Tennessee, etc. R. Co. v. Williams*, 3 Tenn. Cas. 8. See § 211.

<sup>1</sup>*Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464, 31 S. W. Rep. 38; *Morse on Banks & Banking*, sec. 221.

<sup>2</sup>*National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 52 S. W. Rep. 265, 74 Am. St. 527.

<sup>3</sup>*American Brewing Co. v. United States*, 33 Ct. of Cls. 349; *Miltenberger v. Cooke*, 18 Wall. 421.

<sup>4</sup>*Cole v. Sackett*, 1 Hill, 516. In

[372] In England, and generally in this country, it is believed that the debtor's negotiable note or bill of a third person, when received by mutual agreement of the parties as satisfaction, has that effect; and the rule applies equally whether the debt be antecedent or contemporaneous.<sup>1</sup> Where

this case Cowen, J., said: "It may be considered at present as entirely settled that to operate as a satisfaction the promise must be of some third person; in other words, something over and above the original debt. A promise by note is a security of no higher degree than an implied promise; and the logic of these pleas is no more than saying: 'Your precedent debt is discharged because I promised to pay it in another form, and you accepted the latter promise as a satisfaction.' What consideration is there for such an acceptance? The new promise to do a thing which the debtor was bound to do before — a thing which he now refuses to do, because he had promised again and again to do it! In these promising times, there are, I apprehend, few debts which on such a theory are not in danger of being barred much short of the statutes of limitations; for creditors, however unwilling, are many times obliged to accept promises as the only satisfaction they can obtain for the present. It is entirely settled that a promissory note in no way affects or impairs the original debt unless it be paid."

Notwithstanding the argument, from want of consideration, in the foregoing opinion, Judge Cowen conceded to negotiable notes taken for an account some additional value to the creditor in *Myers v. Welles*, 5 Hill, 463: "Being negotiable, they might be used more beneficially than the account. Besides, they operate to liquidate the plaintiff's claim. *These advantages constituted sufficient consideration for the suspension.*" See *Frisbie v. Larned*, 21

Wend. 450; *Putnam v. Lewis*, 8 Johns. 389; *Hawley v. Foote*, 19 Wend. 516.

On principle, it might well be claimed that where the new note is supported by sufficient consideration for forbearance, that consideration is sufficient for a discharge of the original debt.

<sup>1</sup> *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. Rep. 1130, 22 L. R. A. 785; *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. Rep. 537; *Holmes v. Laraway*, 64 Vt. 175, 23 Atl. Rep. 762; *Mulligan v. Hollingsworth*, 99 Fed. Rep. 216; *Kell v. Larkin*, 72 Ala. 493; *Dryden v. Stephens*, 19 W. Va. 1; *Mayer v. Mordecai*, 1 S. C. 398; *Smith v. Hobleman*, 12 Neb. 502, 11 N. W. Rep. 753; *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 id. 23; 2 Am. Lead. Cas. (5th ed.) 273; 1 Smith Lead. Cas. pt. 1 (7th Am. ed.) \*456; *Yates v. Valentine*, 71 Ill. 648; *Chitty on Bills*, 289 *et seq.* and p. 119; *Story on Prom. Notes*, § 389, note 3, § 405; *Seltzer v. Coleman*, 32 Pa. 493; *Smith's Merc. L.* 542; *Cornwall v. Gould*, 4 Pick. 444; *Huse v. Alexander*, 2 Met. 157; *Sheehy v. Mandeville*, 6 Cranch, 253; *Maillard v. Duke of Argyle*, 6 M. & G. 40; *Hart v. Boller*, 15 S. & R. 162, 16 Am. Dec. 536; *Jones v. Shawan*, 4 W. & S. 257; *Sutton v. The Albatross*, 2 Wall. C. C. 327; *Keough v. McNitt*, 6 Minn. 513. See *Goenen v. Schroeder*, 18 id. 66; *Bank v. Bobo*, 11 Rich. 597; *Haven v. Foley*, 19 Mo. 636; *Dougal v. Cowles*, 5 Day, 511; *Bonnell v. Chamberlin*, 26 Conn. 487; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Foster v. Hill*, 86 N. H. 526; *Moody v. Leavitt*, 2 N. H. 171; *Costelo v. Cave*, 2 Hill (S. C.),

any person is obligated to pay money, a payment made in any mode, either property, his negotiable paper, or other securities, if such payment is received as a full satisfaction of the demand, it is equivalent for the purpose of payment to cash.<sup>1</sup> Though the general rule is otherwise, in Massachusetts,<sup>2</sup> Maine,<sup>3</sup>

528, 27 Am. Dec. 404; *Drake v. Mitchell*, 3 East. 251; *Foster v. Allanson*, 2 D. & E. 479; *Moravia v. Levy*, id. 483, n.; *Watson v. Owens*, 1 Rich. 111; *The Kimball*, 3 Wall. 37; *Brown v. Olmsted*, 50 Cal. 162; *Alley v. Rogers*, 19 Gratt. 366; *Burrows v. Bangs*, 34 Mich. 304.

<sup>1</sup> *O'Bryan v. Jones*, 38 Mo. App. 90; *Rice v. Dudley*, 34 id. 383; *Dryden v. Stephens*, 19 W. Va. 1; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *Gillilan v. Nixon*, 26 Ill. 52; *Cox v. Reed*, 27 id. 434; *Wilkinson v. Stewart*, 30 id. 48; *Leake v. Brown*, 43 id. 376; *Tinsley v. Ryon*, 9 Tex. 405; *Robson v. Watts*, 11 Tex. 764; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Wright v. Lawton*, 37 Conn. 167; *Gage v. Lewis*, 68 Ill. 604; *Doolittle v. Dwight*, 2 Met. 561; *Witherby v. Mann*, 11 Johns. 518; *McLellan v. Crofton*, 6 Me. 304; *Randall v. Rich*, 11 Mass. 494; *Pearson v. Parker*, 3 N. H. 366; *Atkinson v. Stewart*, 2 B. Mon. 348; *Howe v. Buffalo*, etc. R. Co., 37 N. Y. 297; *Keller v. Boatman*, 49 Ind. 104.

In *Pitzer v. Harmon*, 8 Blackf. 112, 44 Am. Dec. 738, a negotiable note was given by the surety and was taken in discharge and satisfaction; held not such a payment as would warrant a recovery against the principal for money paid. See *Bennett v. Buchanan*, 3 Ind. 47.

If a check given for a pre-existing debt is ultimately paid there is no "debt owing or accruing" to the creditor between the times of the delivery of the check and its payment so as to make the debtor who drew it subject to garnishment. El-

*well v. Jackson*, 1 Cab. & Ellis, 362; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. Rep. 16. 1 L. R. A. 201; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544.

As to the payment of costs by check in order to be entitled to appeal, see *Burns v. Smith*, 180 Pa. 606, 37 Atl. Rep. 105.

<sup>2</sup> *Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Thatcher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Maneely v. McGee*, 6 Mass. 143, 4 Am. Dec. 105; *Chapman v. Durant*, 10 Mass. 47; *Johnson v. Johnson*, 11 id. 361; *Whitcomb v. Williams*, 4 Pick. 288; *Fowler v. Bush*, 21 id. 230; *Wood v. Bodwell*, 12 id. 268; *Scott v. Ray*, 18 id. 268; *French v. Price*, 24 id. 13; *Brewer Lumber Co. v. Boston & A. R. Co.*, 179 Mass. 228, 60 N. E. Rep. 548.

<sup>3</sup> *Dole v. Hayden*, 1 Me. 152; *Wise v. Hilton*, 4 id. 435; *Homes v. Smith*, 16 id. 181; *Gilmore v. Bussey*, 12 id. 418; *Trustees, etc. v. Kendrick*, id. 381; *Comstock v. Smith*, 23 id. 202; *Bunker v. Barron*, 79 id. 62, 1 Am. St. 282, 8 Atl. Rep. 253; *Varner v. Nobleborough*, 2 Me. 121, 11 Am. Dec. 48.

In *Dole v. Hayden*, *supra*, upon a settlement of mutual accounts a promissory note was given for the balance supposed to be due, but by a mistake in computation the note was made for \$20 more than in truth was due; it was held that the debtor might recover this sum from the creditor although the note still remained unpaid. The court treated the mistake as substantially an

Indiana,<sup>1</sup> Louisiana<sup>2</sup> and Vermont,<sup>3</sup> it is thoroughly settled that when a creditor receives a negotiable note of the debtor, either for an antecedent or a contemporaneous simple contract debt, it [373] is presumed to be received as absolute and not conditional payment. This is a presumption of fact only, liable to be controlled by evidence that such was not the intention of the parties.<sup>4</sup> In Wisconsin the taking of a bill of exchange on a previous indebtedness of the drawer to the payee is *prima facie* payment of the debt.<sup>5</sup>

This presumption rests upon the theory that when a note is given for goods it is equally convenient for the creditor, and generally more so, to sue on it than on the original promise; and so there is no reason for considering the original simple contract as still subsisting and in force; therefore, it is pre-

omission to allow \$20 of the plaintiff's account, and the action as brought for it.

<sup>1</sup> "It is settled by the decisions of this court that the giving of a promissory note, governed by the law merchant, for a pre-existing indebtedness of the maker to the payee will discharge such debt unless it is shown that the parties did not intend it to have that effect. And the giving of a promissory note not governed by the law merchant does not operate as a payment thereof unless it is so agreed between the parties." *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. Rep. 518.

Where a debtor gave his creditor notes payable to his wife the court refused to hold that they were given and accepted as payment, although they were payable in bank, because the creditor could not use them as commercial paper unless the wife indorsed them. *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. Rep. 434.

The presumption of payment arising from the acceptance of bills of exchange is not difficult to overcome, and parol evidence may be received

for that purpose. *Keck v. State*, 12 Ind. App. 119, 39 N. E. Rep. 899.

<sup>2</sup> *Hunt v. Boyd*, 2 La. 109.

<sup>3</sup> *Hodges v. Fox*, 36 Vt. 74; *Street v. Hall*, 29 id. 165.

But if the creditor takes a note under a misapprehension as to the facts, he supposing that parties are bound by it who are not, the presumed intention to treat the note as payment is rebutted, and there may be a recovery upon the original debt. *Wait v. Brewster*, 31 Vt. 516, 527.

<sup>4</sup> *Butman v. Howell*, 144 Mass. 66, 10 N. E. Rep. 504; *Green v. Russell*, 132 Mass. 536; *Fowler v. Ludwig*, 34 Me. 460; *Dodge v. Emerson*, 131 Mass. 467; *Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Maneely v. McGee*, 6 Mass. 143, 4 Am. Dec. 105; *Watkins v. Hill*, 8 Pick. 522; *Howland v. Coffin*, 9 id. 54; *Reed v. Upton*, 10 id. 525; *Butts v. Dean*, 2 Met. 76, 35 Am. Dec. 389; *Brewer Lumber Co. v. Boston & A. R. Co.*, 179 Mass. 228, 60 N. E. Rep. 548, and cases cited in notes to the next paragraph.

<sup>5</sup> *Mehlberg v. Tisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 id. 69, 43 N. W. Rep. 724.

sumed that it was intended by the parties that the note should be deemed a satisfaction.<sup>1</sup> The presumption, however, is founded on the negotiable character of the note, and does not apply to other instruments.<sup>2</sup> The same presumption arises in Massachusetts when payment is made by the note of a third person, unless there is an agreement to the contrary, or equivalent circumstances;<sup>3</sup> but it is otherwise in Indiana,<sup>4</sup> unless the creditor surrenders the debtor's notes and sues upon the note of the third person.<sup>5</sup> The presumption that a note is taken as satisfaction is affected by circumstances. Thus, where the note given is not the obligation of all the parties who are liable for the simple contract debt, and, *a fortiori*, when [374] the note given is that of a third person, and if held to be in satisfaction would wholly discharge the liability of other parties previously liable, the presumption, if it exists at all, is of much less weight.<sup>6</sup> The fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended; as where it would imply the discharge of a mortgage,<sup>7</sup> or the

<sup>1</sup> *Curtis v. Hubbard*, 9 Met. 328. See *Brewer Lumber Co. v. Boston & A. R. Co.*, 179 Mass. 228, 234, 60 N. E. Rep. 548, for other reasons.

<sup>2</sup> *Alford v. Baker*, 53 Ind. 279; *Trustees v. Kendrick*, 12 Me. 381; *Chapman v. Coffin*, 14 Gray, 454; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145; *Wadh v. Curtis*, 96 Me. 309, 52 Atl. Rep. 762.

<sup>3</sup> *Wiseman v. Lyman*, 7 Mass. 286.

Taking the negotiable note of a third person and entering it on the books as payment is not conclusive that it is such. *Brigham v. Lally*, 130 Mass. 485.

<sup>4</sup> *Godfrey v. Crisler*, 121 Ind. 203, 22 N. E. Rep. 999; *Bristol Manuf. Co. v. Probasco*, 64 Ind. 406.

<sup>5</sup> *Dick v. Flanagan*, 122 Ind. 277, 23 N. E. Rep. 765. See *Hooker v. Hubbard*, 97 Mass. 175; *Dewey v. Bell*, 5 Allen, 165.

<sup>6</sup> *Paine v. Dwinel*, 53 Me. 52, 87 Am. Dec. 533; *Kidder v. Knox*, 48 Me. 555; *Strang v. Hirst*, 61 id. 15;

*Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Maneely v. McGee*, 6 Mass. 143, 4 Am. Dec. 105; *Emerson v. Providence Hat Manuf. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *French v. Price*, 24 Pick. 13; *Barnard v. Graves*, 16 id. 41; *Curtis v. Hubbard*, 9 Met. 328.

<sup>7</sup> *Taft v. Boyd*, 13 Allen, 86; *Bunker v. Barron*, 79 Me. 62, 1 Am. St. 282, 8 Atl. Rep. 253; *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 id. 22; *Zerrano v. Wilson*, 8 Cush. 424. See *Fowler v. Bush*, 21 Pick. 230.

In *Weddigen v. Boston, etc. Co.*, 100 Mass. 422, a buyer sent the seller a third person's check to pay for a bill of goods; the seller sent a receipt for the amount as received in settlement of the bill. At the time of sending the check the buyer supposed it to be good, but it was seasonably presented and dishonored; held not a payment or accord and satisfaction.

Where a debtor gave his negoti-

lien of a vendor, including the right of stoppage *in transitu*.<sup>1</sup> The taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired.<sup>2</sup> In some states, and upon very good reasons, a distinction is made as to the effect to be given to security executed by the debtor. If it is not of higher rank than the evidence of indebtedness held by the creditor it is not presumed to be accepted in payment, but if he takes a higher security or a better assurance of payment than he was before possessed of the presumption is to the contrary.<sup>3</sup> Where the debtor executes a note in which he waives his right to claim exemptions and gives it to his creditor, it is presumed to be taken by him in payment of a book account.<sup>4</sup> The general distinction was made by Judge Story; he thought, however, that it ought not to be extended to security given by a third person.<sup>5</sup> Whether a note is to have the effect of payment or to be considered as collateral only is to be determined by the law of the state in which it was made and is payable, though the creditor resides in another state and the indebtedness which was the consideration for the note was incurred there.<sup>6</sup>

§ 226. **Same subject.** The rule in the states above named is exceptional. It is held generally in this country, as well as

able note for the amount of his debt, and included more than lawful interest in consideration of further delay of payment, the note being void for usury, held the original debt was not discharged and might still be recovered, though a receipt was given at the time the note was taken. *Johnson v. Johnson*, 11 Mass. 359; *Stebbins v. Smith*, 4 Pick. 97; *Ramsdell v. Soule*, 12 Pick. 126; *Meshke v. Van Doren*, 16 Wis. 319; *Lee v. Peckham*, 17 id. 383. See *Webster v. Stadden*, 14 id. 277.

A negotiable note given in New York for goods sold there by a citizen of that state is no satisfaction of the original debt, so as to bar an action in Massachusetts for the same, although the note was lost and the vendor had given the vendee a receipt stating that the note was re-

ceived in full for the goods. *Vanclee v. Therasson*, 3 Pick. 12.

<sup>1</sup> *Brewer Lumber Co. v. Boston & A. R. Co.*, 179 Mass. 228, 60 N. E. Rep. 548.

<sup>2</sup> *Paine v. Dwinel*, 53 Me. 52, 87 Am. Dec. 533; *Lovell v. Williams*, 125 Mass. 442; *Walker v. Mayo*, 143 id. 42, 8 N. E. Rep. 873; *Vallier v. Ditson*, 74 Me. 553; *Hercules Iron Works v. Hummer*, 4 Ill. App. 598.

<sup>3</sup> *Chalmers v. Turnipseed*, 21 S. C. 126; *Pelzer v. Steadman*, 22 id. 279; *Gardner v. Hust*, 2 Rich. 608.

<sup>4</sup> *Lee v. Green*, 83 Ala. 491, 3 So. Rep. 785.

<sup>5</sup> *United States v. Lyman*, 1 Mason, 482, 505.

<sup>6</sup> *Gilman v. Stevens*, 63 N. H. 342; *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. Rep. 1137, 38 Am. St. 536.

in England, that a note, bill or check of the debtor or of a third person, given and received on account of a previous debt or one contemporaneously contracted,<sup>1</sup> is not absolute, but conditional, payment, unless it is accepted as such, or unless it produces payment.<sup>2</sup> The principle is applicable to a check which

<sup>1</sup> Wisconsin is apparently another exception so far as contemporaneous debts are concerned. *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. Rep. 694; but not as to antecedent debts. *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. Rep. 762.

<sup>2</sup> The cases which expressly hold the doctrine stated in the text are very numerous: a few only are cited here; those which will be cited in the subsequent discussion of the various branches of the subject under consideration are in harmony with those here collected, except the decisions in Massachusetts, Maine, Indiana, Louisiana and Vermont, and in Wisconsin as to bills of exchange and some cases there and elsewhere which make a distinction between the obligations of the debtor and third persons where they are given for a contemporaneous debt. See first paragraph of last section. *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *White v. Boone*, 71 Tex. 712, 12 S. W. Rep. 51; *Caldwell v. Hall*, 49 Ark. 508, 1 S. W. Rep. 62; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. Rep. 28; *Thomas v. Westchester County*, 115 N. Y. 47, 4 L. R. A. 477, 21 N. E. Rep. 624; *Fry v. Patterson*, 49 N. J. L. 612, 10 Atl. Rep. 390; *Brabazon v. Seymour*, 42 Conn. 554; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. Rep. 558; *Bradley v. Harwi*, 43 Kan. 314, 23 Pac. Rep. 566; *Levan v. Wilten*, 135 Pa. 61, 19 Atl. Rep. 145; *Whitcher v. Dexter*, 61 N. H. 91; *Holmes v. Briggs*, 131 Pa. 233, 18 Atl. Rep. 928 (these last two cases qualify the

proposition by the condition that the creditor must not so improperly conduct himself with respect to the note as to injure the debtor); *Selby v. McCullough*, 26 Mo. App. 66; *Knox v. Gerhauser*, 3 Mont. 267; *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 58 Am. Rep. 667; *Fleig v. Sleet*, 43 Ohio St. 53, 54 Am. Rep. 800, 1 N. E. Rep. 24; *First Nat. Bank v. Case*, 63 Wis. 504, 22 N. W. Rep. 833 (the rule is otherwise where a bill of exchange is accepted; see last paragraph); *Woodburn v. Woodburn*, 115 Ill. 427, 5 N. E. Rep. 82; *Heath v. White*, 3 Utah, 474, 24 Pac. Rep. 762; *Wiles v. Robinson*, 80 Mo. 47; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. Rep. 769; *Hess v. Dille*, 23 W. Va. 90; *Keel v. Larkin*, 72 Ala. 493; *Cheltenham Stone & G. Co. v. Gates Iron Works*, 23 Ill. App. 635, 124 Ill. 633, 16 N. E. Rep. 923; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Wilhelm v. Schmidt*, 84 Ill. 183; *Pritchard v. Smith*, 77 Ga. 463; *Costello v. Cave*, 2 Hill (S. C.), 207; *Slocomb v. Lurty*, *Hempst. C. C.* 431; *People v. Howell*, 4 Johns. 296; *Bates v. Rosekrans*, 37 N. Y. 409; *Webster v. Stadden*, 14 Wis. 277; *Burrows v. Bangs*, 34 Mich. 304; *Peter v. Beverly*, 10 Pet. 532; *Owenson v. Morse*, 7 T. R. 64; *Chastain v. Johnson*, 2 Bailey, 574; *Alley v. Rogers*, 19 Gratt. 368; *The Kimball*, 3 Wall. 37; *Newell v. Nixon*, 4 id. 572; *Lee v. Tinges*, 7 Md. 215; *Harris v. Johnston*, 9 Cranch, 311; *Good v. Cheesman*, 2 B. & Ad. 328; *Winslow v. Hardin's Ex'r*, 3 Dana, 543; *Adger v. Pringle*, 11 S. C. 527; *Johnson v. Clarke*, 15 id. 72; *Scott v. Gilkey*, 153 Ill. 168, 39 N.

is certified before its delivery to the creditor. The only effect of the certificate is to increase the currency of the check by adding to the liability of the drawer that of the bank. The creditor does not assume the risk of the solvency of the latter.<sup>1</sup> Renewal of a note is not always considered to be a payment,<sup>2</sup> and will not discharge a mortgage security.<sup>3</sup> But

E. Rep. 265; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. Rep. 727; Angus v. Chicago Trust & Savings Bank, 170 Ill. 398, 48 N. E. Rep. 946; Hercules Iron Works v. Hummer, 49 Ill. App. 598; Schumacher v. Edward P. Allis Co., 70 id. 556; Bradford v. Neil & Mahnke Construction Co., 76 Ill. App. 488; Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77; Topeka Capital Co. v. Merriam, 60 Kan. 397, 56 Pac. Rep. 757; Kirkpatrick v. Bessalo, 116 Mich. 657, 74 N. W. Rep. 1042; London & San Francisco Bank v. Parrott, 125 Cal. 472, 58 Pac. Rep. 164, 73 Am. St. 64; Woodward v. Holmes, 67 N. H. 494, 41 Atl. Rep. 72; Acme Harvester Co. v. Axtell, 5 N. D. 315, 65 N. W. Rep. 680; Carroll v. Sweet, 128 N. Y. 19, 13 L. R. A. 43, 27 N. E. Rep. 763; Willow River Lumber Co. v. Luger Furniture Co. 102 Wis. 636, 78 N. W. Rep. 762 (previous debt); Sutton v. Baldwin, 146 Ind. 361, 45 N. E. Rep. 518; Blair v. Wilson, 28 Gratt. 165; Holland v. Rongey, 168 Mo. 16,

76 S. W. Rep. 568; Nason v. Fowler, 70 N. H. 291, 47 Atl. Rep. 263.

<sup>1</sup> Born v. First Nat. Bank, 123 Ind. 78, 7 L. R. A. 442; 18 Am. St. 312, 24 N. E. Rep. 173; Bickford v. Same, 42 Ill. 238; Larsen v. Breene, 12 Colo. 480, 21 Pac. Rep. 498; Andrews v. German Nat. Bank, 9 Heisk. 211, 24 Am. Rep. 300; Mutual Nat. Bank v. Rotge, 28 La. Ann. 933, 25 Am. Rep. 126.

<sup>2</sup> Adams v. Squires, 61 Ill. App. 513; Chisholm v. Williams, 128 Ill. 115, 21 N. E. Rep. 215; Tyler v. Hyde, 80 Ill. App. 123; Kemmerer's Appeal, 102 Pa. 558; Graham's Estate, 14 Phila. 280; National Bank v. Bigler, 83 N. Y. 51; Kibbey v. Jones, 7 Bush, 243; Jagger Iron Co. v. Walker, 76 N. Y. 521.

"The question whether renewal notes extinguish the debt is a vexed one, and is usually one of fact, and the courts have differed somewhat upon the presumptions which arise from the bare fact of renewal by note bearing the signature of other

<sup>3</sup> Reeder v. Nay, 95 Ind. 164; Williams v. Starr, 5 Wis. 534; Eastman v. Porter, 14 Wis. 39; Flower v. Elwood, 66 Ill. 438; Coles v. Withers, 33 Gratt. 186; Fowler v. Bush, 21 Pick. 230.

In the last case a mortgage was given as security for a debt payable in instalments; after the first instalment became due the mortgagee called on the mortgagor for payment, saying he could sell the note and mortgage if such instalment were paid. The mortgagor

thereupon gave a negotiable note for such instalment, payable in four months, upon which the mortgagee proposed to raise the money at a bank; and the following indorsement was made on the original note: "Received the first instalment on the within. \$402.78." The mortgagee subsequently sold the note and mortgage. It was held that this was a payment of such instalment and not a mere change of security for the same debt; that the mortgage was discharged *pro tanto*.



it, seems where renewal is a discount of the new note, and there is a payment of the old note out of the avails, it is a discharge of the old debt.<sup>1</sup> Courts are in the habit of saying that when such paper is given for a debt it is not to be deemed a satisfaction unless there is an express agreement to that effect.<sup>2</sup> It is probably not necessary that the proof should be just in that form; but it is doubtless essential that there be an express agreement or circumstances of approximately equal force to show that intention.<sup>3</sup> There is such a lack of harmony [377]

parties. The subject was discussed in the case of *Nightingale v. Chafee*, 11 R. I. 609, 23 Am. Rep. 531, where it was held that an agreement to discharge a retiring partner will not be inferred from the acceptance of the note of the continuing partners. Whatever may be the rule in other cases, we concur with Prof. Parsons in the opinion that, unless there is evidence of a contrary intention, renewals at bank ought always to be regarded as payment because the banks themselves so regard them. See 3 Pars. Notes & B. (2d ed.), p. 203. In commenting on the opinion, the court in the Rhode Island case says: 'He does not tell us how he knows they so regard them.' This opinion of Prof. Parsons is not to be brushed away by a question. The practices of banks are well known, and from them their understanding may be inferred. Certainly, since the passage of the federal banking law, the whole course of national banks has been at variance with the idea that the original debt continued, and that successive renewals were additional and collateral security to the first obligation. The policy of the law is to require the banks to confine their loans to short-time paper, generally secured by indorsers, who may vary from time to time as the notes are renewed. We think it would be a surprise to those who indorse paper to be told that their obligation re-

mains after the note has been taken up and canceled by several renewals, and each in its turn taken up and canceled." *Childs v. Pellett*, 102 Mich. 558, 566, 61 N. W. Rep. 54.

<sup>1</sup> *Fisher v. Marvin*, 47 Barb. 159; *Castleman v. Holmes*, 4 J. J. Marsh. 1. *Contra*, *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

<sup>2</sup> *The Kimball*, 3 Wall. 37; *Segrist v. Crabtree*, 181 U. S. 287, 9 Sup. Ct. Rep. 687; *Pritchard v. Smith*, 77 Ga. 463; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. Rep. 28; *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. Rep. 762. See *Case Manuf. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. Rep. 360.

<sup>3</sup> *Randlet v. Herren*, 20 N. H. 102; *Johnson v. Cleaves*, 15 id. 332; *Slocomb v. Lurty*, Hemp. C. C. 431; *Youngs v. Stahelin*, 34 N. Y. 258; *Yates v. Valentine*, 71 Ill. 643.

In *Eastman v. Porter*, 14 Wis. 39, it is said that where, in connection with the fact that negotiable paper is taken on account of a debt, it is alleged or acknowledged to have been received "as payment," or "in full," or "in full of all demands," these expressions must be considered with that fact, and interpreted as meaning *conditional payment*.

In *La Fayette County Monument Corp. v. Magoon*, 73 Wis. 627, 42 N. W. Rep. 17, 3 L. R. A. 761, the communications between the parties

in the adjudications that it is unsafe to attempt to formulate a rule from them. There is a marked tendency in the later cases to lessen the old rule which required an express agreement in

were to the effect that M. hereby subscribes and hands to the treasurer of said corporation \$1,000 in money to be used, etc. In acknowledging the receipt of this and the accompanying check it was said, "received from M. the sum of \$1,000 according to the foregoing letter." Held, that the check was received as money. *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 542; *Johnson v. Weed*, 9 Johns. 310, 6 Am. Dec. 279; *Tobey v. Barber*, 5 Johns. 68, 4 Am. Dec. 326; *Putnam v. Lewis*, 8 Johns. 389; *Bateman v. Bailey*, 5 T. R. 512; *Puckford v. Maxwell*, 6 id. 52; *Bradford v. Fox*, 38 N. Y. 289; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. Rep. 28.

In Connecticut, as evidence that a new note is received in payment of an account, peculiar importance is attached to a receipt which expresses that the note is given in *full payment*. It is there held that such a receipt is a discharge unless it is executed under circumstances of mistake, accident or surprise, or is founded in fraud. *Bonnell v. Chamberlin*, 26 Conn. 487; *Fuller v. Crittenden*, 9 id. 401, 23 Am. Dec. 364; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384; *Hurd v. Blackman*, 19 Conn. 177. See *Bishop v. Perkins*, id. 300; *Beam v. Barnum*, 21 id. 202.

An effort to collect acceptances given by a debtor, when they were not received in payment, is not such an appropriation of them as satisfies the debt. *Olyphant v. St. Louis Ore & S. Co.*, 28 Fed. Rep. 729.

Entering the amount of the negotiable note of a third person upon the creditor's books to the debtor's credit without making any other appropriation of it does not conclusively

show that it was taken in payment. *Brighton v. Lally*, 130 Mass. 485. Nor does the subsequent rendering of monthly statements showing such credit. *Cheltenham Stone & G. Co. v. Gates Iron Works*, 23 Ill. App. 35, 124 Ill. 623, 16 N. E. Rep. 123.

If the check of a third person is taken the creditor's neglect to give the debtor prompt notice of its dishonor, his retention of it and collecting a dividend out of the drawer's estate do not raise a presumption that it was taken as absolute payment; these facts are exclusively for the jury. *Holmes v. Briggs*, 131 Pa. 233, 18 Atl. Rep. 923.

The English law is thus stated: "The debt may be considered as actually paid if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of the present payment of the debt is no more than giving an extended credit, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs payment cannot legally be enforced, but the debt continues till payment is actually made: and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given." Per Langdale, M. R., in *Sayer v. Wagstaff*, 5 Beav. 415, 423. If the creditor is offered cash but voluntarily takes a bill he is paid

order that payment should follow the taking of security,<sup>1</sup> and to regard the surrender or retention of the original security as decisive of the intention of the parties,<sup>2</sup> because if the creditor intends to resort to security he already holds he will not

and cannot resort to his debtor if the bill is dishonored. *Marsh v. Pedder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 id. 19; *Anderson v. Hillies*, 12 C. B. 499. But unless the creditor had an opportunity to receive money a bill if taken will be presumed to have been accepted as conditional payment. *Robinson v. Read*, 9 B. & C. 449. Under a contract for the sale of goods to be paid for by the buyer's acceptances or other like forms of credit, the payment is conditional only, and upon dishonor of the bills the seller may sue upon the original contract for the price of the goods; upon a refusal to give the bills the remedy of the seller is for that breach of contract, and he cannot sue for the contract price until the expiration of the stipulated credit. *Leake's Contracts*, 894; *Paul v. Dod*, 2 C. B. 800; *Helms v. Winterbottom*, 2 B. & Ad. 431; *Gunn v. Bolckow*, L. R. 10 Ch. 500.

<sup>1</sup> An express agreement to receive payment in something else than money need not be proved; it may be implied from the facts and circumstances. *Griffin v. Petty*, 101 N. C. 380, 7 S. E. Rep. 729; *Adams v. Squires*, 61 Ill. App. 513; *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. Rep. 215.

A debtor proposed by letter to remit a draft "in payment of bill in full;" the creditor acknowledged the receipt of the draft in full payment. There was no cause of action against the debtor on the account; his liability rested upon his indorsement. *Day v. Thompson*, 65 Ala. 269.

An express agreement is not necessary to make the check, note or bill payment. *Riverside Iron Works*

*v. Hall*, 64 Mich. 165, 31 N. W. Rep. 152; *Brown v. Dunckel*, 46 Mich. 32, 18 N. W. Rep. 537; *Keel v. Larkin*, 72 Ala. 493; *Morris v. Harveys*, 75 Va. 726; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. Rep. 374, 5 L. R. A. 802 (contemporaneous debt).

The intention to receive a note and collaterals in payment is inferable from an entry in the creditor's books to the effect that they were received in settlement of balance, and a receipt expressing that they were in settlement of the above account. *Williams, Ex parte*, 17 S. C. 396.

In *Griffin v. Anderson*, 3 S. C. 105, the words "settled in full" in the bond of a commissioner were considered sufficient to indicate that a note was taken in payment of a balance due from him. See *In re Hurst*, 1 Flip. 462.

If notes secured by a mortgage nearly equal in amount to the debt are given and the balance is paid in cash, and part of the notes are used by the creditor, the debt is extinguished. *Quidnuck Co. v. Chafee*, 13 R. I. 438.

<sup>2</sup> *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. Rep. 152; *Brown v. Dunckel*, 46 Mich. 32, 18 N. W. Rep. 537; *Morris v. Harveys*, 75 Va. 726; *Fidelity Ins., etc. Co. v. Shenandoah Valley R. Co.*, 86 id. 1, 19 Am. St. 858, 9 S. E. Rep. 759; *Burchard v. Frazer*, 23 Mich. 224; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. Rep. 1130, 22 L. R. A. 785.

A creditor cannot insist that a note taken by him does not discharge his claim unless he offers to surrender it. *Davis & Ranking Building & Manuf. Co. v. Montrose Butter & Cheese Co.*, 59 Ill. App. 573.

surrender it. In the absence of an agreement or acts of the parties indicative of a contract, a negotiable note or bill of exchange taken as conditional payment will have the effect to suspend the right of action until it matures.<sup>1</sup> And then it will [378] not be presumed in favor of the creditor that it remains unpaid; he must account for it; and so if he receives a check. Such paper, unless it has been lost, must be produced at the trial of an action on the original consideration that it may be surrendered or canceled.<sup>2</sup>

Where the new note is made by a third person the surrender of the old will be, *prima facie*, a discharge of it and a release of its maker from personal liability; but not if the holder of the old note had a specific lien on land as security for the debt and the result of giving the new note is to make the person liable on it the owner of the land, part of the consideration being the new note. *Hess v. Dille*, 23 W. Va. 90; *Merchants' Nat. Bank v. Good*, 21 id. 455.

Walker, C. J., in *Strong v. King*, 35 Ill. 9, 19, said: "The bare reception of a check from the drawer for the amount of the bill will not, ordinarily, be considered as payment, but only as a means of payment; and this is the rule whether the bill is surrendered to the drawer at the time of receiving the check or is retained by the holder until the payment is consummated. It may be imprudent to surrender the bill before actual payment is made, but such improvidence does not change the rule."

In *Flower v. Elwood*, 66 Ill. 438, 444, the same judge said: "And although the surrender of the notes by the mortgagee to the maker is *prima facie* evidence of their payment, still such presumption may be rebutted."

In *Yates v. Valentine*, 71 Ill. 643, his associate, apparently delivering the unanimous opinion of the court, said: "We can conceive of no act showing more decisively that it was

intended by the parties that the note was satisfied and should be canceled. It was intended that the defendant should thereafter be bound by the terms of the notes then given, and the old note was given him that it might cease to exist as an evidence of indebtedness against him." *Chastain v. Johnson*, 2 Bailey, 574; *Eastman v. Porter*, 14 Wis. 39; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690.

Ordinarily the surrender by a creditor to the debtor of the promissory note of the latter on the acceptance of the note of a third person for that amount is *prima facie* evidence that it is taken in satisfaction of the note so surrendered. *Youngs v. Lee*, 12 N. Y. 551; *Pratt v. Coman*, 37 id. 440; *Phoenix Ins. Co. v. Church*, 81 id. 218, 225, 37 Am. Rep. 494. But whether the original debt is in fact discharged depends upon the parties' intention. *Noel v. Murray*, 13 N. Y. 167.

A note given by executors does not discharge an indebtedness due from the estate of their testator whose note was surrendered to them unless such was the understanding of the parties. *Glenn v. Burrows*, 37 Hun, 602.

<sup>1</sup> *The Kimball*, 3 Wall. 37; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Griffith v. Grogan*, 12 Cal. 317; *Putnam v. Lewis*, 8 Johns. 389; *Brewster v. Bours*, 8 Cal. 501; *Lee v. Tinges*, 7 Md. 215; *Smith v. Owens*, 21 Cal. 11.

<sup>2</sup> *Stevens v. Bradley*, 22 Ill. 224;.

§ 227. **Same subject.** By accepting the note, bill or check, either of the debtor or of a third person, as conditional payment the creditor assumes the duty of doing anything in respect to it which is necessary not only to obtain payment by due presentment, but also by protest and notice to fix the liability of the parties. And the *onus* is upon him to show that he has performed that duty.<sup>1</sup> If there are other parties to such paper to which the holder could resort in case of its dishonor any want of diligence on the part of the creditor receiving it, by which such parties are discharged, will preclude such creditor from returning it and suing upon the original debt.<sup>2</sup>

There is not the same arbitrary strictness in the rule of diligence and in respect to consequences of neglect where a check is received as a means of payment, or even as payment, that prevails in regard to notes and bills. The drawer is in no case discharged from his responsibility to pay the check unless he has suffered some loss or injury by the omission or neglect to make presentment, and then only *pro tanto*.<sup>3</sup>

Heartt v. Rhodes, 66 id. 351; Carroll v. Holmes, 24 Ill. App. 453; O'Bryan v. Jones, 38 Mo. App. 90; McMurray v. Taylor, 30 Mo. 263, 77 Am. Dec. 611; Salomon v. Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667; McConnell v. Stettinius, 7 Ill. 707; Dangerfield v. Wilby, 4 Esp. 159; Hadwen v. Mendizabel, 10 Moore, 477; Jaffrey v. Cornish, 10 N. H. 505; Mehlberg v. Tisher, 24 Wis. 607; Dayton v. Trull, 23 Wend. 345; Burdick v. Green, 15 Johns. 247; Smith v. Rogers, 17 id. 340; Hughes v. Wheeler, 8 Cow. 78; Eastman v. Porter, 14 Wis. 39; Plant's Manuf. Co. v. Falvey, 20 Wis. 200; Cromwell v. Lovett, 1 Hall, 56; Taylor v. Allen, 36 Barb. 294.

<sup>1</sup> Kilpatrick v. Home Building & L. Ass'n, 119 Pa. 30, 12 Atl. Rep. 754; Phoenix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756; Dayton v. Trull, 23 Wend. 345; Cooper v. Powell, Anthon, 49; Little v. Phenix Bank, 2 Hill, 425, 7 id. 359; Jennison v. Parker,

7 Mich. 355; Heartt v. Rhodes, 66 Ill. 351; Bradford v. Fox, 39 Barb. 203, 16 Abb. Pr. 51, 38 N. Y. 289; Story on Prom. Notes, § 498; Roberts v. Thompson, 14 Ohio St. 1, 82 Am. Dec. 465; Schierl v. Baumel, 75 Wis. 69, 43 N. W. Rep. 724; Corbett v. Clark, 45 Wis. 406; Allan v. Eldred, 50 id. 135, 6 N. W. Rep. 565; Chicago, etc. R. Co. v. Wisconsin, etc. R. Co., 76 Iowa, 615, 41 N. W. Rep. 375.

The drawer does not waive anything by a subsequent promise to pay unless he made it with knowledge of the facts, which the holder has the burden of proving. Schierl v. Baumel, *supra*.

<sup>2</sup> Id.; Sandy River Nat. Bank v. Miller, 82 Me. 137, 19 Atl. Rep. 109.

<sup>3</sup> McWilliams v. Phillips, 71 Ala. 80; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Gibbs v. Cannon, 9 S. & R. 201; Overton v. Tracey, 14 id. 311; Holmes v. Briggs, 131 Pa. 233, 18 Atl. Rep. 928; Story on Prom. Notes,

Where the debtor is an indorser of the check he delivers to his creditor the latter must present it for payment within the time limited for so doing by the law merchant, otherwise, if the bank upon which the check is drawn fails and there was money to the credit of the drawer to meet the check if it had been presented without undue delay, the debtor's liability for the original indebtedness will be extinguished. The creditor has the *onus* of showing that the indorser was not injured by the delay, the latter having proved that the check was not duly presented, and this rule prevails whether the suit is on the check or on the indebtedness to pay which the check was indorsed and transferred.<sup>1</sup> In an earlier case in the same state a debtor indorsed to his creditor a draft on a third party due in thirty days, the proceeds of which were to be credited to the debtor's account. The draft was not presented at maturity, and soon thereafter the drawee became insolvent. The creditor had no redress either upon the draft or the original in-

§ 497; Kent's Com., Lec. 44; Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, id. 259; Murray v. Judah, 6 Cow. 484; Commercial Bank v. Hughes, 17 Wend. 94; Harbeck v. Craft, 4 Duer, 122; Mohawk Bank v. Broderick, 10 Wend. 304; Little v. Phenix Bank, 2 Hill, 425; Serle v. Norton, 2 Mood. & Rob. 401; Hill v. Beebe, 13 N. Y. 556.

In Bradford v. Fox, 38 N. Y. 289, the defendant averred payment, and it was held that, though made by a check, the *onus* of proving that the check resulted in payment was on him. Grover, J., said: "To effect this, proof of the delivery and receipt of the check by the plaintiff not being sufficient, the defendant was bound to go further and show that by the laches of the plaintiff a loss had been incurred, to be borne by some one: and when this appeared, the law would cast the loss upon the plaintiff, and would work out such result by making the check operate as payment of the debt."

It is believed, however, that after

delivery of a check to a creditor as a means of payment, the weight of authority puts the burden of proof on him to show that the check was unproductive; and if there has been a want of diligence, that no loss or injury has resulted to the debtor. Murray v. Judah, 6 Cow. 484; Syracuse, etc. R. Co. v. Collins, 3 Lans. 29.

The drawer of a check has his remedy against the agent who accepted it for collection if harm resulted from his negligence. Morris v. Eufaula Nat. Bank, 106 Ala. 383, 389, 18 So. Rep. 11; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546; Chouteau v. Rowse, 56 Mo. 65; Clarke v. Gates, 67 Mo. 139.

As to the measure of diligence required in the case of a bank which has received a local check for collection, see Morris v. Eufaula Nat. Bank, 122 Ala. 580, 25 So. Rep. 499, overruling s. c., 106 Ala. 383, 18 So. Rep. 11.

<sup>1</sup> Kirkpatrick v. Puryear, 93 Tenn. 409, 22 L. R. A. 785, 24 S. W. Rep. 1130.

debtedness.<sup>1</sup> "If the creditor had received of his debtor a check and failed to present it, the principle would have been the same precisely. If he had received part or all the money on the draft and failed to credit it, beyond question such receipt would have been a good defense *pro tanto* or in whole to the collection of the debt due by the account; so we think, on sound principle, a failure to receive when he ought to have received, such failure being the result of his own negligence or the party to whom he had indorsed it, should equally work the same result. He fails to account in either case for the collateral. He has had the benefit of it as a security for his debt and took it as a means of payment, thus depriving the original holder of the right to control and putting himself in his place. He cannot impose upon him the entire loss when it results from his own neglect, while controlling or having the right to control the paper." A chose in action in any form received as conditional payment or as collateral security, to the extent collected or paid, or of the loss by the creditor's negligence, or when transferred by him to a third person, unless taken back, is payment on account of the debt for which it was received.<sup>2</sup> So if the creditor take from his debtor an order or note payable to a third person.<sup>3</sup>

<sup>1</sup> *Betterton v. Roope*, 3 Lea, 215, 31 Am. Rep. 633.

In *Carroll v. Sweet*, 128 N. Y. 19, 13 L. R. A. 43, 27 N. E. Rep. 763, the defense to an action to recover a claim was payment. The facts as stated by the reporter were that W. gave his check to the defendant for the amount of a loan. The defendant, the same day, indorsed and delivered the check to the plaintiff, at the

place where the bank on which it was drawn was located, to apply upon the indebtedness in suit. W. requested the plaintiff to hold the check for a few days, stating that if the plaintiff would let him know when he wished to use the check he would then provide for it. W. testified on the trial that he had then money enough to pay the check and would have paid it had payment

<sup>2</sup> *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. Rep. 862; *Massachusetts Benefit L. Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. Rep. 918, 42 L. R. A. 261; *Looney v. District of Columbia*, 113 U. S. 258, 5 Sup. Ct. Rep. 463; *Brown v. Same*, 17 Ct. of Cls. 402; *Donnelly v. Same*, 119 U. S. 339, 7 Sup. Ct. Rep. 276; *Loth v. Mothner*, 53 Ark. 116, 13 S. W. Rep. 594; *Smith v. Ferrand*, 7 B.

& C. 19; *Harris v. Johnston*, 3 Cranch. 311; *John v. John*, Wright, 584; *McCluny v. Jackson*, 6 Gratt. 96; *Parker v. United States*, 1 Pet. C. C. 262; *Lawrence v. Schuylkill Navigation Co.*, 4 Wash. C. C. 562; *Bill v. Porter*, 9 Conn. 23. See *Case Manuf. Co. v. Soxman*, 138 U. S. 431, 438, 11 Sup. Ct. Rep. 360.

<sup>3</sup> *Shaw v. Gookin*, 7 N. H. 16.

§ 228. Collaterals collected or lost by negligence of creditor are payments. When security is given for a debt and money is realized therefrom, it is, as has just been said, a payment *pro tanto*.<sup>1</sup> The money thus received is deemed so appropriated by mutual agreement.<sup>2</sup> It is payment, not merely a set-off;<sup>3</sup> but if the debtor pays his debt after such collections on collaterals he may recover them from the creditor.<sup>4</sup>

[380] There is an implied obligation on the creditor to account for the proceeds of collaterals. His failure or refusal to give an account of the application thereof will operate as a bar to the recovery of the debt itself.<sup>5</sup> But where the collat-

been insisted upon. The plaintiff kept the check for nine days before he presented it for payment. W. in the meantime had become insolvent. The cashier of the bank on which the check was drawn testified that there were no funds to meet it, and that it would not have been paid if it had been presented any time after the day of its date. There was no agreement that the check should be taken in satisfaction of the debt. Held, that it was error to direct a verdict for the plaintiff; that the delay in presenting the check discharged the defendant from liability as indorser; that the delay was not excused by the fact that the drawer had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment; that while the indorsement and transfer of the check operated as a provisional payment only, if the delay caused a loss to the defendant, to the extent of the loss the delay was tantamount to actual payment; that as there was evidence tending to show that the delay prevented a collection of the check in whole or in part, and that so much was lost to the defendant, the case was for the jury.

<sup>1</sup> *Montgomery v. Schenck*, 82 Hun, 24, 31 N. Y. Supp. 42; *Pauly v. Wilson*, 57 Fed. Rep. 548; § 227. See *New*

*London Bank v. Lee*, 11 Conn. 112, 73 Am. Dec. 713.

A mortgage or other security to indemnify an accommodation indorser is not available as security for the debt, either to relieve the indorser or surety from paying it (*Post v. Tradesmen's Bank*, 28 Conn. 420; *Horne v. Savings Bank*, 7 id. 478), or as a means of payment at the instance of the creditor. *Ohio Life Ins. & T. Co. v. Reeder*, 18 Ohio, 35, 46. See *Russell v. La Roque*, 13 Ala. 149.

If collaterals have been exchanged for other securities which prove to be worthless the debtor, whose paper was accepted conditionally, is not released except so far as he is injured. *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. 504.

<sup>2</sup> *Pope v. Dodson*, 58 Ill. 360; *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Midgeley v. Slocomb*, 2 Abb. Pr. (N. S.) 275; *Lincoln v. Bassett*, 23 Pick. 154; *Kenniston v. Avery*, 16 N. H. 117; *Dismukes v. Wright*, 3 Dev. & Bat. 78.

<sup>3</sup> *King v. Hutchins*, 28 N. H. 561; *In re Ouimette*, 1 Sawyer, 47.

<sup>4</sup> *Overstreet v. Nunn*, 36 Ala. 666; *Dorrill v. Eaton*, 35 Mich. 302.

<sup>5</sup> *Simes v. Zane*, 1 Phila. 500; *Dussol v. Bruguire*, 50 Cal. 456.



erals are placed in the hands of a third person by the debtor, and were never in the hands or under the control of the creditor, he is entitled to recover against the debtor without accounting for them.<sup>1</sup> If bank bills have been received it lies on the creditor, in a suit against a surety, to show what has been done with them.<sup>2</sup> Taking a collateral does not suspend the right to bring suit on the debt secured.<sup>3</sup> Nor can the debtor obtain credit thereon for such collateral unless it has been collected or appropriated by the creditor, or lost by his negligence or fault.<sup>4</sup>

Where negotiable paper is received as a means of payment it is *prima facie* payment, and the creditor must show what has become of it; show diligence to obtain payment, or excuse non-presentment, and produce it at the trial.<sup>5</sup> A note delivered as collateral continues a valid security until the debt is paid, notwithstanding it is changed in form, as into a judgment.<sup>6</sup> And a creditor who holds security, without special instructions for its application, for various notes due from his debtor, some of which bear the names of sureties, may, in case of the insolvency of the principal debtor and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection; and

<sup>1</sup> Bank of United States v. Peabody, 20 Pa. 454.

<sup>2</sup> Spaulding v. Bank of Susquehanna County, 9 Pa. 28.

<sup>3</sup> Wilhelm v. Schmidt, 84 Ill. 183; Flanagan v. Hambleton, 54 Md. 222; Williams v. National Bank, 72 id. 441, 450, 20 Atl. Rep. 191; Dugan v. Sprague, 2 Ind. 600; Foster v. Purdy, 5 Met. 442; Lincoln v. Bassett, 23 Pick. 154.

<sup>4</sup> Id.; Fiske v. Stevens, 21 Me. 457; Hawks v. Hinchcliff, 17 Barb. 492; Cooke v. Chaney, 14 Ala. 65; Slevin v. Morrow, 4 Ind. 425; Hall v. Green, 14 Ohio, 499; Prettyman v. Barnard, 37 Ill. 105; Marschuetz v. Wright, 50 Wis. 175, 6 N. W. Rep. 511; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610.

The holder of a note as collateral cannot receive another note in payment of it, and subsequently, with-

out the consent of the pledgor or his assignee, return the note received and take back the original note, so as to reinstate the liability of the pledgor or deprive his assignee of the right to the surplus. Post v. Union Nat. Bank, 159 Ill. 421, 42 N. E. Rep. 976.

<sup>5</sup> Dayton v. Trull, 23 Wend. 345; Cooper v. Powell, Anth. 49; Roberts v. Gallagher, 1 Wash. C. C. 156; Brown v. Cronise, 21 Cal. 386; Plant's Manuf. Co. v. Falvey, 20 Wis. 200; Bullard v. Hascall, 25 Mich. 132.

<sup>6</sup> Fisher v. Fisher, 98 Mass. 303; Smith v. Strout, 63 Me. 205; Chapman v. Lee, 64 Ala. 483; Sonoma Valley Bank v. Hill, 59 Cal. 107; Duncombe v. New York, etc. R. Co., 84 N. Y. 193, 88 id. 1; Waldron v. Zacharie, 54 Tex. 503.

insolvent parties upon others cannot avail themselves thereof [381] in any way, in equity, without paying or offering to pay the whole of the notes for which the security was given.<sup>1</sup> A creditor is only obliged to apply the net proceeds of collaterals. Expenses necessarily incurred in rendering them available are to be deducted, and the balance only is a payment upon the debt secured.<sup>2</sup> But the equitable interest of the assignee of a non-negotiable promissory note assigned as collateral security extends only to the amount of the debt for the security of which it was assigned, and not to the costs which have accrued in a suit subsequently brought thereon. And a release from the payee, executed subsequent to the assignment, will be available for all of such collateral in excess of such debt.<sup>3</sup> A chose in action which is transferred as collat-

<sup>1</sup>Wilcox v. Fairhaven Bank, 7 Allen, 270. F. and H. made and delivered to S. their joint and several note for \$4,500; before its maturity S. gave his note for \$1,000 to C., and indorsed and delivered as collateral the note of F. and H. C. subsequently assigned S.'s note to F. and delivered the note of F. and H. as collateral security. After this S. sold and assigned the note of F. and H., then in the hands of F., to D., who thereafter demanded the \$4,500 of F., offering to credit the same with the amount of the \$1,000 note, which was refused. Held, that D. was entitled to recover on the note against F. and H. less the amount of the \$1,000 note.

A principal note is paid as against a surety thereon, when the holder receives payment of a larger note pledged as collateral security therefor, though a third note be taken in lieu of such collateral note. *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. Rep. 976.

<sup>2</sup>Starrett v. Barber, 20 Me. 457; *Herrington v. Pouley*, 26 Ill. 94; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

<sup>3</sup>*Blake v. Buchanan*, 22 Vt. 548. The defendant and one A. of Massachusetts exchanged notes of equal amounts and having equal time to run, in August, 1854. Later in the same month A. deposited defendant's notes and others as collateral, and procured a discount of his own note for \$8,000 by plaintiff. The note had ten days to run; A. failed to pay it, and was driven into insolvency. Separate suits were brought against the defendant on his notes when they became due. At the time of bringing these suits between \$3,000 and \$4,000 of the collaterals had been paid. When the actions (together) were tried, the collaterals had been paid in to an amount sufficient to pay the plaintiff's claim, except about \$200. Held, that the plaintiff should have judgment for the full amount of the notes, interest and costs, but the rights of the defendant should be provided for by an order in the judgment permitting him to be discharged by paying the balance due the plaintiff with costs; the residue to be paid into court to be subject to its further order on the application of A.'s assignees, or of A.

eral security is put under the control of the creditor to [382] make his claim out of it, and it is not in the nature or subject to the incidents of a pawn or pledge. It should be collected, not sold.<sup>1</sup>

§ 229. **Same subject.** A creditor receiving collateral securities is required to use ordinary diligence, and to observe good faith in respect to the same; if they are lost or impaired through his act or neglect he is liable to the debtor to the extent of the injury; and such damages, or so much as is necessary therefor, will inure as a payment of the debt for which the collaterals were received as security.<sup>2</sup> If they be negotiable paper to mature at a future day, due diligence imposes on the creditor the necessity of doing those acts which will preserve

on notice. *Nantucket Bank v. Stebbins*, 6 Duer, 341.

In *Russell v. La Roque*, 13 Ala. 149, it was held that where a surety received from his principal a note as indemnity, and passed the same over to the creditor as collateral security for the principal, the creditor could not recover upon such note after the principal debt was barred by the statute of limitations; but it would have been otherwise if the note had been delivered to the creditor in discharge of the surety's liability.

<sup>1</sup> *Chambersburg Ins. Co. v. Smith*, 11 Pa. 120; *Nelson v. Wellington*, 5 Bosw. 178; *Brookman v. Metcalf*, id. 429.

<sup>2</sup> *Roberts v. Gallagher*, 1 Wash. C. 156; *Gallagher v. Roberts*, 2 id. 191; *Hanna v. Holton*, 78 Pa. 334, 21 Am. Rep. 20; *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. 504; *Miller v. Gettysburg Bank*, 8 Watts, 192; *Dyott's Estate*, 2 W. & S. 463; *Lishy v. O'Brien*, 4 Watts, 141; *Bank of United States v. Peabody*, 20 Pa. 454; *Chambersburg Ins. Co. v. Smith*, 11 id. 120; *Sellers v. Jones*, 22 id. 423; *Muirhead v. Kirkpatrick*, 21 id. 237; *Foote v. Brown*, 2 McLean, 369; *Brown v. Cronise*, 21 Cal. 386; *Whitten v.*

*Wright*, 34 Mich. 92; *Exeter Bank v. Gordon*, 8 N. H. 66; *Finnell v. Meaux*, 3 Bush. 449; *Kenniston v. Avery*, 16 N. H. 117; *In re Brown*, 2 Story, 502; *Chamberlyn v. Delarive*, 2 Wilson, 353; *Bonta v. Curry*, 3 Bush, 678; *Russell v. Hester*, 10 Ala. 535; *Powell v. Henry*, 27 Ala. 612; *Lee v. Baldwin*, 10 Ga. 208; *Cardin v. Jones*, 23 Ga. 175; *Kiser v. Ruddick*, 8 Blackf. 382; *Noland v. Clark*, 10 B. Mon. 239; *Hoffman v. Johnson*, 1 Bland Ch. 103; *Steger v. Bush, Sm. & M. Ch.* 172; *Barrow v. Rhineland*, 3 Johns. Ch. 619; *Jennison v. Parker*, 7 Mich. 355; *Goodhall v. Richardson*, 14 N. H. 567; *White v. Howard*, 1 Sandf. 81; *Nexsen v. Lyell*, 5 Hill, 466; *Montague v. Stelts*, 37 S. C. 200, 15 So. Rep. 968, 34 Am. St. 736.

If the creditor is negligent the debtor need not claim his damages by separate action or counter-claim, but may interpose the negligence as a defense to his creditor's action and require an accounting for the collaterals. *Montague v. Stelts*, *supra*. The loss of the collateral by theft, without negligence, before the maturity of the principal note, is not a defense to an action on the latter. *Winthrop Savings Bank v. Jackson*, 67 Me. 570, 24 Am. Rep. 56.

the liability of indorsers or other secondary parties.<sup>1</sup> In case of neglect the creditor is liable for the actual loss, but no more;<sup>2</sup> and the *onus* is on the debtor to show the extent of the injury.<sup>3</sup> [383] So if the creditor receives a check in payment of a debt, and unreasonably delays presenting it, he is only liable for the actual injury to the drawer.<sup>4</sup>

A transfer of the collateral by the creditor is an appropriation of it, and he will be held to have elected to take it for what appears by its face to be due thereon in satisfaction to that extent.<sup>5</sup> If he transfers the collateral for less than its face it is his loss.<sup>6</sup> He must settle with the debtor for the whole nominal value of the collateral, though he settled with the maker for less, or took a note in part satisfaction.<sup>7</sup> A creditor may relinquish a collateral security to his debtor without the consent of other creditors, and not thereby lose his resort to the debtor's property.<sup>8</sup> But a surety would be discharged by such relinquishment; for the creditor is bound to hold security for the benefit of the surety as well as for himself; and if he parts with it, without the knowledge or against the will of the surety, he will lose his claim against him to the value of what is so surrendered.<sup>9</sup> One who receives from his debtor as collateral negotiable paper of a third person, indorsed by the debtor, makes it his own and releases the debtor's indorsement if he neglects to protest it for non-payment.<sup>10</sup> A creditor having a

<sup>1</sup> Jennison v. Parker, 7 Mich. 355; Russell v. Hester, 10 Ala. 535; Keniston v. Avery, 16 N. H. 117; Foote v. Brown, 2 McLean, 369; Brown v. Cronise, 21 Cal. 386; Phoenix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756.

<sup>2</sup> Aldrich v. Goodell, 75 Ill. 452; Coonley v. Coonley, Hill & Denio, 312.

<sup>3</sup> Id.; Fiske v. Stevens, 21 Me. 457.

<sup>4</sup> McWilliams v. Phillips, 71 Ala. 80; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Bell v. Alexander, 21 Gratt. 1. See § 227.

<sup>5</sup> Hawks v. Hinchcliff, 17 Barb. 492; Looney v. District of Columbia, 113 U. S. 258, 5 Sup. Ct. Rep. 463; Donnelly v. Same, 119 U. S. 339, 7 Sup.

Ct. Rep. 276; Williams, Ex parte, 17 S. C. 396; Adger v. Pringle, 11 id. 535; Townsends v. Stevenson, 4 Rich. 62.

<sup>6</sup> Id.

<sup>7</sup> Depuy v. Clark, 12 Ind. 427. See Garlick v. James, 12 Johns. 146; Phillips v. Thompson, 2 Johns. Ch. 418, 7 Am. Dec. 535.

<sup>8</sup> Dyott's Estate, 2 W. & S. 463.

<sup>9</sup> Stewart v. Davis, 18 Ind. 74. See ch. 17.

<sup>10</sup> Whitten v. Wright, 34 Mich. 92. In this case, upon the trial the plaintiff offered to show that at the time the note was given the maker was insolvent, that he was so at the time of its maturity, and continued so up to the time of the trial, for the purpose of showing that though the note

note for the purchase-money of a slave, on the death of [384] the purchaser took possession of the slave; he was held liable for the injury done to the estate as executor *de son tort*, and the amount of such liability payment so far upon the note.<sup>1</sup> A creditor who included in a mortgage a premium for a policy of insurance on the life of the debtor as additional security for the debt and neglected to effect the insurance was held liable as upon an express agreement to insure for the amount of the sum for which he should have procured insurance.<sup>2</sup>

§ 230. **Who may make payments.** The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, seems to be that it is not sufficient to discharge the debtor unless it is made as agent for him and on his account, and with his prior authority or subsequent ratification; but the debtor may ratify the payment by pleading it unless he has previously disavowed it.<sup>3</sup> The

was not properly protested the defendant lost nothing by it. That evidence was held properly excluded. Marston, J., delivering the opinion of the court, said: "It is of the utmost importance that no uncertainty should exist as to the rights and liabilities of parties to negotiable paper. Should the introduction of evidence upon the trial be sanctioned to show that an indorser had not suffered any injury from a want of protest and notice, an element of uncertainty would then exist, and the way would be opened for a new class of questions and much needless litigation. The value of a note cannot always be determined from the solvency or insolvency alone of the maker. As was said in *Rose v. Lewis*, 10 Mich. 485, 'the value of negotiable paper is well understood not to be absolutely dependent on the amount of property liable to execution which may be possessed by the maker. A very large portion of current securities of undoubted goodness would, under such a test, be worthless. And in cases where

the holder of such paper is indebted to the maker, it may be as valuable to him, by way of set-off, as if the maker were wealthy and in sound credit. The value of commercial paper must always depend very much upon the integrity and business habits of those who issue it. And we cannot perceive the justice or good sense of any rule which should disregard the results of common experience.' If the note in this case had been properly protested and notice given to the defendant, he might have been able to collect it or secure its payment. We think the evidence was properly excluded."

<sup>1</sup> *Finnell v. Meaux*, 3 Bush, 449.

<sup>2</sup> *Soule v. Union Bank*, 45 Barb. 111, 30 How. Pr. 105.

<sup>3</sup> *Gray v. Herman*, 75 Wis. 453, 44 N. W. Rep. 248, 6 L. R. A. 691; *Walter v. James*, L. R. 6 Ex. 124; *Simpson v. Eggington*, 10 Ex. 845; *James v. Isaacs*, 12 C. B. 791; *Belshaw v. Bush*, 11 id. 191; *Jones v. Broadhurst*, 9 id. 193; *Clow v. Borst*, 6 Johns. 37; *Stark v. Thompson*, 3 T. B. Mon. 296; *Woolfolk v. McDowell*,

payment by a principal of a claim for goods delivered to his agent is not the satisfaction of it by a mere stranger, and it extinguishes the demand of the creditors.<sup>1</sup> And so of the payment of a claim made by the principal stockholder in a cor-

9 Dana, 268; Lucas v. Wilkinson, 1 Hurl. & N. 420; Atlantic Dock Co. v. Mayor, 53 N. Y. 64; Bleakley v. White, 4 Paige, 654.

In a note to Simpson v. Eggington, *supra*, it is said that "the rule which requires the consideration to move between the parties has been modified in many important particulars by the introduction of the action for money had and received, and it would seem only reasonable to permit a debt to be extinguished by a payment made to a creditor whenever the circumstances are such that the amount paid might have been recovered by the debtor had no debt existed."

The early cases on the subject are considered by Creswell, J., in Jones v. Broadhurst, *supra*, and also in the arguments of counsel in Walter v. James, *supra*. See Hooper's Case, 2 Leon. 110; Grimes v. Blofield, Cro. Eliz. 541; Edgecombe v. Rodd, 5 East, 294.

In Belshaw v. Bush, 11 C. B. 191 (1851), Maule, J., said: "If a bill given by the *defendant* himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and if it have that operation, the plea in the present case will have the same effect as if it had alleged that *the money* was paid by William Bush (the stranger) for and on account of the debt. But, if

a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect to it, it must be payment on behalf of the other, against whom alone the causes of action exist, and if adopted by him, will operate as payment by himself." Coke, Litt. 206b, 36 H. 6.

James v. Isaacs, 12 C. B. 791 (1852). In *assumpsit* for work and labor the defendant pleaded that the money mentioned in the declaration accrued due to the plaintiff under an agreement for the building of a church; that the plaintiff having suspended the work another agreement was entered into between him and one A. under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A. duly made and the plaintiff received the payments stipulated for by the second agreement in satisfaction and discharge of the original agreement between the plaintiff and the defendants, and of the performance thereof by the latter. Held, that the plea was bad in substance inasmuch as it did not show that the agreement made by A. and the payments under it were intended to be made for the benefit of the defendants, and that they adopted A.'s acts. See 2 Am. Lead. Cas. (4th ed.) 270; Wellington v. Kelly, 84 N. C. 543; Wolff v. Walter, 56 Mo. 292.

<sup>1</sup> Case v. Phillips, 182 Ill. 187, 55 N. E. Rep. 66.

poration to one for services rendered it as general manager.<sup>1</sup> A payment made to the holder of a note by an indorser, not as agent for the maker, but simply in discharge of his own obligation, the note having been executed by the maker for value, does not inure to the benefit of the latter, and in an action upon the note he is liable for the whole amount for which it was given. So far as the indorser's payment is concerned it was an equitable purchase of the note by him.<sup>2</sup> In a Wisconsin case the defendant became a debtor for the benefit of a third person, who made payment of his own volition and on his own behalf. The trial court ruled that it was not competent for the party sued to plead payment by another party who was not sued, and who could not be affected by the judgment. Cole, C. J., considered this ruling by asking: "Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What sense or reason is there in any such technical rule as that, if it exists? If a debt is fully paid it would seem, according to plain common sense, that the obligation was extinguished and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?"<sup>3</sup> The demand of a creditor which is paid with the money of a third person, without an agreement that the security shall be assigned or kept alive for the benefit of such third person, is extinguished.<sup>4</sup> Payment made by

<sup>1</sup> Porter v. Chicago, etc. R. Co., 99 Iowa, 351, 68 N. W. Rep. 724.

<sup>2</sup> Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. Rep. 557, 33 Am. St. 751, 20 L. R. A. 335, following Jones v. Broadhurst, 9 C. B. 175, the doctrine of which is recognized in England in Thornton v. Maynard, L. R. 10 C. P. 695. The New York case is of first impression in the United States.

<sup>3</sup> Gray v. Herman, 75 Wis. 453, 44 N. W. Rep. 248, 6 L. R. A. 691; Porter v. Chicago, etc. R. Co., *supra*.

In Harrison v. Hicks, 1 Port. 423, 27 Am. Dec. 638, the payment of a debt by a stranger to the contract

was held an extinguishment of it, whether made by the debtor's consent or not.

In Pearce v. Bryant Coal Co., 121 Ill. 590, 13 N. E. Rep. 561, payment by a trustee at the request of an officer of the corporation owing the debt extinguished the evidence of the indebtedness so that the trustee could not enforce it.

Payment made by one who is primarily liable extinguishes the debt. Smith v. Waugh, 84 Va. 806, 6 S. E. Rep. 132.

<sup>4</sup> Grady v. O'Reilly, 116 Mo. 346, 23 S. W. Rep. 798.

a third person at the request of the debtor inures to the latter's benefit.<sup>1</sup> After default in the performance of the conditions of a bill of sale providing that the title to the goods shall not pass until full performance, the vendor is not bound to receive payment from any person except his own vendee.<sup>2</sup> If the creditor accepts payment under a mistake of fact, as by erroneously supposing that the person who made it had authority to do so, he may return the money and apply to his debtor for the payment of his demand.<sup>3</sup> Satisfaction by one joint tort-feasor or joint debtor is a bar to an action against another,<sup>4</sup> and a payment made by one of several joint debtors inures to the benefit of all as a credit upon the debt.<sup>5</sup> But one joint maker of a note cannot, by payment thereon, unless authorized by his co-obligor, stop the running of the statute of limitations. Where that statute is involved and the payments on a note are all indorsed in the payee's handwriting, made in the absence of the maker, the former must show that such payments were made by the latter or by his authority.<sup>6</sup> If a creditor, knowing the liability of his debtor, takes the individual note of his agent in payment, without at the same time doing anything to indicate a purpose to hold the principal, the latter is discharged.<sup>7</sup>

[387] A purchaser of mortgaged property subject to the mortgage may pay the debt, and payment by him extinguishes the lien.<sup>8</sup> If a mere stranger or volunteer pays a debt for which another is bound he cannot be subrogated to the cred-

<sup>1</sup> Crawford v. Tyng, 10 N. Y. Misc. 143, 30 N. Y. Supp. 907.

<sup>2</sup> Lippincott v. Rich, 19 Utah, 140, 56 Pac. Rep. 806.

<sup>3</sup> Walter v. James, L. R. 6 Ex. 124.

<sup>4</sup> Livingston v. Bishop, 1 Johns. 291, 3 Am. Dec. 330; Thomas v. Rumsey, 6 Johns. 31; Barrett v. Third Avenue R. Co., 45 N. Y. 635; Woods v. Pangborn, 76 id. 498; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. Rep. 518; Knapp v. Roche, 94 N. Y. 329; Brick v. Bual, 73 Tex. 511, 11 S. W. Rep. 1044; Goldbeck v. Kensington Nat. Bank, 147 Pa. 267, 23 Atl. Rep. 565.

<sup>5</sup> Goldbeck v. Kensington Nat. Bank, *supra*.

<sup>6</sup> Waughop v. Bartlett, 165 Ill. 124, 46 N. E. Rep. 197.

<sup>7</sup> Ames Packing & P. Co. v. Tucker, 8 Mo. App. 95; Paige v. Stone, 10 Met. 169; Wilkin v. Reed, 6 Me. 220, 19 Am. Dec. 211; French v. Price, 24 Pick. 22; Hyde v. Paige, 9 Barb. 250. A less extended rule is applied in some cases. Coleman v. First Nat. Bank, 53 N. Y. 388; Calder v. Dobell, L. R. 6 C. P. 486.

<sup>8</sup> Appledorn v. Streeter, 20 Mich. 9.



itor's rights in respect to the security given by the real debtor; but if the person who pays is compelled to pay for the protection of his own interests and rights, he is entitled to such subrogation.<sup>1</sup>

§ 231. **To whom payment may be made.** Payment must be made to the creditor or to one authorized by him to receive it as agent or assignee; or to one whom the law substitutes in the creditor's place as executor, administrator, creditor by trustee process, or the like. If it is made to one entitled to receive it the debt is extinguished though there was a mistake as to the right in which the amount paid accrued.<sup>2</sup> Payment of a judgment or decree to an attorney of record who obtained it, before his authority is revoked and notice of it given, is valid as to the party making the payment,<sup>3</sup> but payment of a judgment after it has been assigned to one who is merely the beneficial owner is not a discharge of it; it is otherwise when payment is made to the person having the legal title without notice of his assignment.<sup>4</sup> A sheriff is only entitled to receive payment of an execution when he is in possession of a judicial mandate directing him to make the collection of the sum called for, unless he is the creditor's agent.<sup>5</sup> Payment made to the party designated by the creditor is good,<sup>6</sup> but such a designation may be changed, and if changed, the debtor pays to the person originally designated at his peril,<sup>7</sup> if he has notice of the substitution. If an attorney who has a claim for collection places it in the hands of another for that purpose, the owner assenting, payment to the latter discharges the debt.<sup>8</sup> If a principal has clothed his agent with the *indicia* of authority to receive payment,<sup>9</sup> as by intrusting to him the pos-

<sup>1</sup> Hough v. *Ætna L. Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18; Grady v. O'Reilly, 116 Mo. 346, 22 S. W. Rep. 798.

<sup>2</sup> Hemphill v. Moody, 64 Ala. 468.

<sup>3</sup> Harper v. Harvey, 4 W. Va. 539; Yoakum v. Tilden, 3 id. 167, 100 Am. Dec. 738.

<sup>4</sup> Seymour v. Smith, 114 N. Y. 481, 11 Am. St. 683, 21 N. E. Rep. 1042.

<sup>5</sup> Bailey v. Hester, 101 N. C. 538, 8 S. E. Rep. 164.

<sup>6</sup> Walker v. Crosby, 38 Minn. 34,

35 N. W. Rep. 475; Sailer v. Bar-nousky, 60 Wis. 169, 18 N. W. Rep. 763; Fiske v. Fisher, 100 Mass. 97.

<sup>7</sup> Rice & Bullen Malting Co. v. International Bank, 185 Ill. 422, 56 N. E. Rep. 1062, 86 Ill. App. 136; Meeker v. Manina, 162 Ill. 203, 14 N. E. Rep. 397; Mechem on Agency, § 224.

<sup>8</sup> Dentzel v. City & Suburban R. Co., 90 Md. 434, 45 Atl. Rep. 201.

<sup>9</sup> Florida Central & P. R. Co. v. Ragan, 104 Ga. 353, 30 S. E. Rep. 745.

session of the goods to be sold, the purchaser is warranted in paying the price of such as he buys to the agent; but if the latter is not in possession of the goods and is only authorized to make sales, payments made to him are at the risk of the payer.<sup>1</sup> Payment to an agent is unauthorized after the death of the principal,<sup>2</sup> unless the agency is coupled with an interest. The fact that the agent is entitled to commissions on sums collected does not give him such an interest as will continue his power after the principal's death; the interest which will work that result must be in the thing on account of which payment is made or in the money paid as such.<sup>3</sup> If a negotiable note, indorsed by the payee in blank, is in the hands of an agent for collection its payment in good faith, after the death of the principal and without notice thereof, is valid.<sup>4</sup> Possession of [388] mercantile paper authorizes the receipt of the money, even before it is due,<sup>5</sup> if the possessor has authority from the owner to collect the amount payable on it.<sup>6</sup> But circumstances

<sup>1</sup> *Lakeside Press & Photo-Engraving Co. v. Campbell*, 39 Fla. 523, 22 So. Rep. 878; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. Rep. 485, 42 Am. Rep. 740; *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Clark v. Murphy*, 164 Mass. 490, 41 N. E. Rep. 674; *Seiple v. Irwin*, 30 Pa. 513; *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. Rep. 628; *Chambers v. Short*, 79 Mo. 204; *Clark v. Smith*, 88 Ill. 298; *Brown v. Lally*, 79 Minn. 38, 81 N. W. Rep. 538; *Crawford v. Whittaker*, 42 W. Va. 430, 26 S. E. Rep. 516; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Keown v. Vogel*, 25 Mo. App. 35; *Pardridge v. Bailey*, 20 Ill. App. 351; *Putnam v. French*, 53 Vt. 404, 38 Am. Rep. 682; *Hoskins v. Johnson*, 5 Sneed, 470; *Capel v. Thornton*, 3 C. & P. 352; *Dean v. International Tile Co.*, 47 Hun, 319; *Higgins v. Moore*, 34 N. Y. 417; *Artley v. Morrison*, 73 Iowa, 132, 34 N. W. Rep. 779; *Adams v. Kearney*, 2 E. D. Smith, 42. See *Stanton v. French*, 83 Cal. 194, 23 Pac. Rep. 355.

If money is paid to an agent who

is not authorized to receive it, the payment is ratified by the principal's bringing an action against him to recover it. *Bailey v. United States*, 15 Ct. of Cls. 490. And by suing to recover the purchase price of goods sold. *Pardridge v. Bailey*, *supra*. See *Estey v. Snyder*, 76 Wis. 624, 45 N. W. Rep. 415; *Payne v. Hackney*, 84 Minn. 195, 87 N. W. Rep. 608.

<sup>2</sup> *Lochenmeyer v. Fogarty*, 112 Ill. 572.

<sup>3</sup> *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 384, 34 N. E. Rep. 784.

<sup>4</sup> *Deweese v. Muff*, 57 Neb. 17, 77 N. W. Rep. 361, 73 Am. St. 488; *Johnson v. Hollensworth*, 48 Mich. 143, 11 N. W. Rep. 843.

<sup>5</sup> *Bliss v. Cutter*, 19 Barb. 9; *Thornton v. Lawther*, 169 Ill. 228, 48 N. E. Rep. 412. For some limitations on this rule see *Dilenbeck v. Rehse*, 105 Iowa, 749, 73 N. W. Rep. 1077.

<sup>6</sup> *Merchants' Nat. Bank v. Camp*, 110 Ga. 780, 36 S. E. Rep. 201; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498.

may impeach a payment made to one having possession of the evidence of the debt. Thus, payment by the maker of a note before maturity to the son of the holder, who had been forbidden to take payment, with the knowledge of the party paying, is not a good payment, although the note is delivered up by the son; the father may maintain a suit for the note, not having ratified the payment.<sup>1</sup> The circumstances, however, must show payment in bad faith; it is not enough that there is gross negligence in not ascertaining the party entitled to the money.<sup>2</sup> Payment of a lost negotiable instrument, after notice of its loss, will not operate as a discharge against the loser unless the person presenting it establishes his title thereto. A notice previously given of the loss of a coupon, distinguishable by its number or other ear-mark, is sufficient to fix upon the maker the duty of inquiry and of refusal to pay a holder who cannot prove his right; especially is this the rule where an instrument is presented after it has matured.<sup>3</sup> Payment to one not in possession of the evidence of debt, and without a surrender of it, is at the risk of the payer; and if the party receiving the money had no right to receive it the note is not discharged.<sup>4</sup> But if the person who receives the money, though

<sup>1</sup> Kingman v. Pierce, 17 Mass. 247.

<sup>2</sup> Cothran v. Collins, 29 How. Pr. 113; Haescig v. Brown, 34 Mich. 503.

<sup>3</sup> Hinckley v. Union Pacific R. Co., 129 Mass. 52, 37 Am. Rep. 297. See Hinckley v. Merchants' Nat. Bank, 131 Mass. 147.

<sup>4</sup> Fortune v. Stockton, 182 Ill. 454, 55 N. E. Rep. 367, 82 Ill. App. 272 (*sub nom.* Stockton v. Fortune); Leon v. McIntyre, 88 id. 349; Englert v. White, 92 Iowa, 97, 60 N. W. Rep. 224; Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. Rep. 351; Hall v. Smith, 3 Kan. App. 685, 44 Pac. Rep. 908; Cummings v. Hurd, 49 Mo. App. 139; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. Rep. 590; Hitchcock v. Kelley, 18 Ohio Ct. Ct. 808; Hollinshead v. Stuart, 8 N. D. 35, 77 N. W. Rep. 89; Stalzman v. Wyman, 8 N. D. 108, 77 N. W. Rep. 285; Rhodes v. Belchee, 36 Ore. 141,

59 Pac. Rep. 117; Wheeler v. Guild, 20 Pick. 545, 32 Am. Dec. 231; Rush v. Fister, 23 Ill. App. 348; Viskoeil v. Doktor, 27 id. 232; Stiger v. Bent, 111 Ill. 328.

Payment of a pledged note to the pledgor will not discharge it. Griswold v. Davis, 31 Vt. 390.

The authorities recognize the rule that "where a principal has, by his voluntary act, placed an agent in a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform, on behalf of his principal, a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it." Johnston v. Milwaukee & Wyoming

he had not possession of the evidence of the indebtedness or authority to receive payment, pays it to the person entitled and such person receives it, the debt is discharged.<sup>1</sup>

The rule that payment to one who is without the evidence of indebtedness is at the risk of the debtor applies though the note is paid at the place designated in it for payment.<sup>2</sup> It was held in Iowa that if a note is made payable at a bank payment made there on the date of the maturity of the note is satisfaction though the note was not in possession of the bank.<sup>3</sup> But this position has been receded from, in deference to the almost unvarying current of authority, to the extent of holding that the fact that a note is so payable does not authorize the bank, in the absence of the note, to collect anything on it before maturity.<sup>4</sup> The authorities are reviewed by the New Jersey court, and the conclusion arrived at (which is concurred in by the Iowa court), that the contract of the maker, acceptor or obligor is to pay the holder of the paper, and the place for payment is designated simply for the convenience of both parties. Making a bill or note payable at a

Investment Co., 46 Neb. 480, 64 N. W. Rep. 1100; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. Rep. 687. This doctrine has been applied where an agent who was not possessed of the mortgage or notes, or a satisfaction of them, received payment of them before it was due. *Harrison v. Legore*, 109 Iowa, 618, 80 N. W. Rep. 670. *Doyle v. Corey*, 170 Mass. 337, 49 N. E. Rep. 651, is in harmony with the cases referred to.

<sup>1</sup> *Second Nat. Bank v. Spottswood*, 10 N. D. 114, 86 N. W. Rep. 359; *Coleman v. Jenkins*, 78 Ga. 605, 3 S. E. Rep. 444.

<sup>2</sup> *McNamara v. Clark*, 85 Ill. App. 439; *Englert v. White*, 92 Iowa, 97, 60 N. W. Rep. 224; *Klindt v. Higgins*, 95 Iowa, 529, 64 N. W. Rep. 414; *Cummings v. Hurd*, 49 Mo. App. 139.

<sup>3</sup> *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. Rep. 457.

<sup>4</sup> *Bank of Montreal v. Ingerson*, 105 Iowa, 349, 75 N. W. Rep. 351, distin-

guishing *Bank of Charleston Nat. Banking Ass'n v. Zorn*, 14 S. C. 444, and citing *Caldwell v. Evans*, 5 Bush, 380, 96 Am. Dec. 358; *Adams v. Hackensack Improvement Commission*, 44 N. J. L. 638, 43 Am. Rep. 406; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 48 N. W. Rep. 526, 24 Am. St. 189; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498; *Ward v. Smith*, 7 Wall. 447; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. 62; *Wood v. Merchants' Saving, Loan & Trust Co.*, 41 Ill. 267; *Grissom v. Bank*, 87 Tenn. 350, 3 L. R. A. 273, 10 S. W. Rep. 744, 10 Am. St. 669; *Turner v. Hayden*, 4 B. & C. 1; *Walton v. Henderson*, *Smith (N. H.)*, 168, as sustaining the doctrine that the bank, in such a case, is not the agent of the payee of the note, though the latter be due, so as to be authorized to accept payment of it, unless the note is in its possession.

banker's is authority to the banker to apply the funds of the acceptor or maker on deposit to the payment of the paper. If maturing paper be left with the banker for collection he becomes the agent of the holder to receive payment; but unless the banker is made the holder's agent by a deposit of the paper with him for collection, he has no authority to act for the holder. The naming of a bank in a note as the place of payment does not make the banker an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon the banker in reference to the note; and the debtor cannot make the banker the agent of the holder simply by depositing with him the funds to pay it. Unless the banker has been made the agent of the holder by the indorsement of the paper or the deposit of it for collection, any money which the banker receives to apply in payment of it will be deemed to have been taken by him as the agent of the payer.<sup>1</sup>

The fact that an attorney is authorized to collect interest does not empower him to receive the principal.<sup>2</sup> Such authority, in the absence of direct proof, may in some cases be inferred from the possession of the bond and mortgage; but it is incumbent upon the debtor who pays to the attorney to show that the securities were in his possession on each occasion when payments were made, for their withdrawal would be a revocation of the authority.<sup>3</sup> If an attorney employed to col-

<sup>1</sup> *Adams v. Hackensack Imp. Commission, supra*; *First Nat. Bank v. Chilson*, 45 Neb. 257, 63 N. W. Rep. 352; *Bartel v. Brown*, 104 Wis. 493, 80 N. W. Rep. 801; *Hollinshead v. Stuart*, 8 N. D. 35, 77 N. W. Rep. 89.

<sup>2</sup> *Campbell v. O'Connor*, 55 Neb. 638, 76 N. W. Rep. 167.

<sup>3</sup> *Williams v. Walker*, 2 Sandf. Ch. 325; *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. 643, 24 N. E. Rep. 456; *Henn v. Conisby*, 1 Ch. Cas. 93; *Gerard v. Baker*, id. 94; *Garrels v. Morton*, 26 Ill. App. 433; *Cox v. Cutter*, 28 N. J.

Eq. 13; *Eaton v. Knowles*, 61 Mich. 625, 28 N. W. Rep. 740; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. Rep. 323; *Lane v. Duchac*, 73 Wis. 646, 41 N. W. Rep. 962. *Contra*, *Shane v. Palmer*, 43 Kan. 481, 23 Pac. Rep. 594; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. 138, 16 Pac. Rep. 762. Compare *Wilcox v. Carr*, 37 Fed. Rep. 130.

A mortgagor who makes the agent of his mortgagee for the collection of the principal and interest due the latter his own agent for the purpose of securing a loan to be used in discharging a mortgage must stand a loss caused by the agent's embezzlement of the money so obtained, the

lect a note receives part of the sum due in cash and takes security in his own favor for the balance, the payment is good *pro tanto*; but the creditor may refuse to accept such security and recover on the note from the maker.<sup>1</sup> If payment of a loan is made to the attorney who negotiated it while he has the custody of the bond and mortgage, with the consent of the mortgagee, and the mortgagor knows the fact, he is discharged although the attorney was not in fact authorized to receive it.<sup>2</sup> If the attorney of a plaintiff comes into possession of money belonging to the defendant and the latter and the attorney agree that it should be paid on the plaintiff's claim, such agreement is payment.<sup>3</sup>

The court of errors and appeals of New Jersey has ruled, by a vote of eleven to one, reversing the vice-chancellor, that the mere possession of a bond and mortgage by one not the obligee will not warrant the payment thereof to such possessor. Many years before payment these papers were drawn by the person to whom payment was made, but of that fact it did not appear that the debtor had any knowledge. The papers were in the possession of the mortgagee from the time of their execution until they were delivered to the scrivener for safe keeping in his vault, and were put up by the mortgagee in a bundle, tied with strings and sealed with wax. Interest had been paid to the scrivener under special authority from the mortgagee.<sup>4</sup> A late case in New York is hard to harmonize with the case just stated, and holds a rule more consonant with the authorities and the analogies of the law. The attorney to whom payment was made had not made the original loan, but had negotiated the purchase of an outstanding bond and mortgage. Of the latter fact it does not appear that the

mortgagor not having directed the agent to apply it to the mortgage in his possession. *Boardman v. Blizard*, 36 Fed. Rep. 26.

The apparent authority of an attorney to receive payment of interest does not depend upon his production to the debtor of the securities, but on his possession of them. *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. 643, 24 N. E. Rep. 456.

<sup>1</sup> *Davis v. Severance*, 49 Minn. 528, 52 N. W. Rep. 140.

<sup>2</sup> *Crane v. Gruenewald*, *supra*; *McConnell v. Mackin*, 22 App. Div. 537, 48 N. Y. Supp. 18.

<sup>3</sup> *Millhiser v. Marr*, 130 N. C. 510, 41 S. E. Rep. 1038.

<sup>4</sup> *Lawson v. Nicholson*, 52 N. J. Eq. 821, 31 Atl. Rep. 386, reversing *Lawson v. Carson*, 50 N. J. Eq. 870, 25 Atl. Rep. 191.

mortgagor had any knowledge; indeed, he did not know of the assignment of the bond and mortgage until informed of it by the receipt of the attorney for interest paid a short time before payment of the principal. The same attorney had been authorized to receive the interest from the assignor of the mortgage, and was so authorized by the assignee, the papers being left in the attorney's possession. It is said: The fact that the agent or attorney has made the loan does not give him authority to collect the debt,<sup>1</sup> nor, it seems, does the mere possession of the security by such attorney give such authority.<sup>3</sup> Both conditions must concur. It is said in the case last cited: "The reason of the rule that one who has made a loan as agent and taken the security is authorized to receive payment when he retains possession of the security is founded upon human experience that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer." The same rule was applied to the case before the court.<sup>3</sup>

In case of a mortgage or other non-negotiable evidence of debt, probably a payment in good faith to the original holder, in the absence of the paper evidence, would be treated as valid, although there had been an actual assignment of the debt.<sup>4</sup> Payment, however, may not be made to an assignor after

<sup>1</sup> To that effect is *Heflin v. Campbell*, 5 Tex. Civ. App. 106, 23 S. W. Rep. 595.

<sup>2</sup> *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502.

<sup>3</sup> *Central Trust Co. v. Folsom*, 167 N. Y. 285, 60 N. E. Rep. 599, approving *Williams v. Walker*, 2 Sandf. Ch. 325.

<sup>4</sup> *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Foster v. Beals*, 21 id. 247. See *Richardson v. Ainsworth*, 20 How. Pr. 521; *Robinson v. Weeks*, 6 id. 161; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Gamble v. Cummings*, 2 Blackf. 235.

It is a fair legal presumption that the creditor who holds a non-negotiable chose in action is entitled to receive payment thereof. If it is as-

signed it is incumbent upon the assignee to show that the debtor was notified in order to protect himself against any payment made to the original creditor. *Heermans v. Ellsworth*, 64 N. Y. 115; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. 138, 16 Pac. Rep. 762; *Bank v. Jones*, 65 Cal. 437, 4 Pac. Rep. 418.

Under the recording acts the record of the assignment of a mortgage is constructive notice to the world of the rights of the assignee; a purchaser of the equity of redemption cannot claim any benefit from payments made to the mortgagee after his assignment has been recorded. *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. Rep. 323; *Viele v. Judson*, 82 N. Y. 32.

notice of such assignment;<sup>1</sup> and will not be recognized even if the assignor still has possession of the securities;<sup>2</sup> not even under garnishment proceedings and an order of the court, if that defense is not made.<sup>3</sup> Where the demand has been assigned, payment as garnishee of the original creditor is not good unless it is compulsory, though there has been no notice of the assignment, for assignment passes the title without notice.<sup>4</sup>

The *bona fide* payment of a debt due a person who died intestate made to his sole heir and the sole distributee of the funds of the estate, before administration is granted, will, if equity requires it, relieve the debtor from liability to an administrator subsequently appointed.<sup>5</sup> If the executor of a deceased postmaster has made application for the readjustment of the latter's salary, requesting that payment be made to him, a payment to the widow of the deceased is not binding on the executor, though she also applied for readjustment.<sup>6</sup> One who pays a note to a person who had sued upon it at law does so at his peril if, at the time of payment, he has notice of the pendency of an appeal in a chancery suit brought against him by another person to establish his right to the note.<sup>7</sup> A husband is not authorized to accept payment for the personal labor of his wife rendered outside his family; but if the debtor sold property to the husband and wife jointly and she agreed that the money due her might be applied on the purchase price, her demand is satisfied.<sup>8</sup>

A compulsory payment under a foreign attachment from a court of competent jurisdiction is good, and will be recognized [389] even in a foreign jurisdiction, though in the latter an earlier attachment had been levied for the same debt.<sup>9</sup> A pay-

<sup>1</sup> Lyman v. Cartwright, 3 E. D. Smith, 117; Meriam v. Bacon, 5 Met. 95; Guthrie v. Bashline, 25 Pa. 80; Field v. Mayor, 6 N. Y. 179; Ten Eick v. Simpson, 1 Sandf. Ch. 244.

<sup>2</sup> Chase v. Brown, 32 Mich. 225.

<sup>3</sup> Roy v. Baucus, 43 Barb. 310.

<sup>4</sup> Richardson v. Ainsworth, 20 How. Pr. 521; Robinson v. Weeks, 6 id. 161; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633.

<sup>5</sup> Vail v. Anderson, 61 Minn. 552, 64 N. W. Rep. 47; Hannah v. Lankford, 43 Ala. 163; Lewis v. Lyons, 13 Ill. 117.

<sup>6</sup> Holt v. United States, 29 Ct. of Cls. 56.

<sup>7</sup> McClintock v. Helberg, 168 Ill. 384, 48 N. E. Rep. 145, 64 Ill. App. 190.

<sup>8</sup> Strickland v. Hamlin, 87 Me. 81, 32 Atl. Rep. 732.

<sup>9</sup> Minor v. Rogers Coal Co., 25 Mo.



ment as trustee or garnishee is good though the trustee might have disputed the jurisdiction of the court ordering such payment.<sup>1</sup> But it is otherwise if the garnishee, knowing that the claim has been assigned, fails to set up that fact, notwithstanding the assignee did not intervene, though having knowledge of the garnishment proceedings.<sup>2</sup> Money paid by the government to a receiver of the property of a citizen by the court of a state in which he is domiciled discharges the claim of the government's creditor.<sup>3</sup>

Where a debt is owing to two persons jointly it may be paid to either. Thus, where two persons joined in an agreement to sell and convey land, it was held that a payment to one of them was good though he had no title to the land.<sup>4</sup> If the survivor of two joint payees of a note is the sole devisee of the deceased payee payment may be made to him.<sup>5</sup> But payment made to a third person is not valid unless such person was authorized by all the obligees to receive it.<sup>6</sup> Payment of money to a part of the heirs of a person insured for their benefit does not discharge the insurer's liability; the indebtedness was not joint.<sup>7</sup> Payment of a debt due to a deceased person, made before letters granted, to a person who afterward takes them out, is made good by the subsequent letters.<sup>8</sup>

The secondary liability of the owner of a building for the services of workmen employed by the contractor and for materials supplied does not arise until the steps prescribed by statute to acquire a lien therefor have been taken; hence payment made to other persons than the contractor does not bind him.<sup>9</sup> The right to the emoluments of an office follows

App. 78; *Allen v. Watt*, 79 Ill. 284; *Lieber v. St. Louis Agricultural & M. Ass'n*, 36 Mo. 382; *Holmes v. Remsen*, 4 Johns. Ch. 460, 20 Johns. 229, 11 Am. Dec. 269; *McDaniel v. Hughes*, 3 East, 367.

<sup>1</sup> *Reed v. Parsons*, 11 Cush. 255; *Sauntry v. Dunlap*, 12 Wis. 364.

<sup>2</sup> *Greenwich Ins. Co. v. Columbia Manuf. Co.*, 73 Ill. App. 560.

<sup>3</sup> *Borcherling v. United States*, 35 Ct. of Cls. 311, 329.

<sup>4</sup> *Waters v. Travis*, 9 Johns. 450; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. Rep. 115; *Oatman v. Walker*,

33 Me. 67; *Moore v. Bevier*, 60 Minn. 240, 62 N. W. Rep. 281; *Henry v. Mt. Pleasant*, 70 Mo. 500.

<sup>5</sup> *Perry v. Perry's Ex'r*, 98 Ky. 242, 32 S. W. Rep. 755.

<sup>6</sup> *Moore v. Bevier*, 60 Minn. 240, 62 N. W. Rep. 281.

<sup>7</sup> *Brown v. Iowa Legion of Honor*, 107 Iowa, 439, 78 N. W. Rep. 73.

<sup>8</sup> *Priest v. Watkins*, 2 Hill, 225, 38 Am. Dec. 584; *In re Faulkner*, 7 Hill, 181.

<sup>9</sup> *Walker v. Newton*, 53 Wis. 336, 10 N. W. Rep. 436.

the true title to it.<sup>1</sup> As between the person entitled to an office and the public, there is no obligation upon the latter until the duties of the office have been assumed. The salary fixed therefor is the reward for express or implied services, and therefore cannot belong to one who has not performed services although he is wrongfully hindered from occupying the position in which he might have rendered them.<sup>2</sup> Where disbursing officers pay compensation for official services, pursuant to law, they are justified, by the weight of authority, on grounds of public policy in paying to a *de facto* officer, and such payment is a good defense to an action against the public by the *de jure* officer to recover the salary, after he has been placed in possession of the office.<sup>3</sup> The public is liable for the salary due and unpaid a *de jure* officer before judgment in his favor.<sup>4</sup> This is the rule whether the compensation arises

<sup>1</sup> Conner v. New York, 2 Sandf. 370; Nichols v. MacLean, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. Rep. 347; People v. Tieman, 30 Barb. 193; Dolan v. Mayor, 68 N. Y. 274, 23 Am. Rep. 168; McVeany v. Mayor, 80 N. Y. 185, 36 Am. Rep. 600; People v. Miller, 24 Mich. 458, 9 Am. Rep. 131; Dorsey v. Smith, 28 Cal. 21; Hunter v. Chandler, 45 Mo. 452; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299; Douglass v. State, 31 Ind. 429; Warden v. Bayfield County, 87 Wis. 181, 58 N. W. Rep. 248.

<sup>2</sup> Smith v. Mayor, 37 N. Y. 518; Connor v. Mayor, 5 id. 285; Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382.

<sup>3</sup> Dolan v. Mayor, 68 N. Y. 274, 23 Am. Rep. 168; McVeany v. Mayor, 80 N. Y. 185, 36 Am. Rep. 600; Auditors v. Benoit, *supra*; Coughlin v. McElroy, 74 Conn. 397, 409, 50 Atl. Rep. 1025; State v. Clark, 52 Mo. 508; Westberg v. Kansas, 64 Mo. 493; Steubenville v. Culp, 38 Ohio St. 18, 23, 43 Am. Rep. 417; Commissioners of Saline County v. Anderson, 20 Kan. 298, 27 Am. Rep. 171; State v. Milne, 36 Neb. 301, 19 L. R. A. 689, 54 N. W. Rep. 531, 38 Am. St. 724; Shannon v. Portsmouth, 54 N. H.

183; Shaw v. Prina County, — Arizona, —, 18 Pac. Rep. 273. *Contra*, Dorsey v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 193; Andrews v. Portland, 79 Me. 484, 10 Atl. Rep. 458; Rasmussen v. Carbon County, 8 Wyo. 277, 45 L. R. A. 295, 56 Pac. Rep. 1098; Philadelphia v. Rink, 2 Atl. Rep. 505 (Pa.).

In Tennessee the test applied is, could the person wrongfully in office compel the payment of the salary to him? The case ruled was this: A. was elected to succeed L.; the latter obtained an injunction restraining A. and the authorities who were about to induct him into office from interfering with his enjoyment of it. The injunction was made perpetual and L. remained in possession and drew the salary. After the injunction was dissolved and A.'s title established by the appellate court, he recovered from the public the salary provided for the office and paid L. during his incumbency. The injunction did not require the officers to make payment thereof to L. Memphis v. Woodward, 12 Heisk. 499.

<sup>4</sup> Dolan v. Mayor, *supra*; Comstock v. Grand Rapids, 40 Mich. 397; People v. Brennan, 30 How. Pr. 417.

from fees payable from the public treasury or an annual salary payable at intervals, and whether the officer was appointed or elected.<sup>1</sup> If payment is made after notice of an adjudication against the right of the person in office the public is liable to the *de jure* officer for the amount.<sup>2</sup> Notice to the government from a corporation that it has changed its treasurer is not effective to prevent payment to the former treasurer in pursuance of a contract in his name.<sup>3</sup> Payment of a private debt due to a member of a firm to the firm of which the creditor is a member will not support a plea of payment in the absence of evidence, express or implied, that the creditor has authorized the receipt of the money by the firm as his agents.<sup>4</sup>

§ 232. **Pleading payment.** By the theory of common-law pleading in the action of *assumpsit*, as well as by the provisions of the modern code, payment, either full or partial, being in confession and avoidance, must be pleaded. It cannot be proved under the general issue or general denial. The issue in debt was upon the existence of present indebtedness; and therefore in that action the rule was different. The general issue in *assumpsit*, however, by a later practice, came to be so expanded as to materially infringe this logical rule; and it was held to embrace many defenses which admitted all the essential facts stated in the declaration, and avoided their effects by matter subsequent, including payment.<sup>5</sup> If the plaintiff al-

<sup>1</sup> *McVeany v. Mayor*, 80 N. Y. 185, 36 Am. Rep. 600.

<sup>2</sup> *Id.*

<sup>3</sup> *Chapter of Calvary Cathedral v. United States*, 29 Ct. of Cls. 269.

<sup>4</sup> *Powell v. Brodhurst*, [1901] 2 Ch. 160.

<sup>5</sup> *McKyring v. Bull*, 16 N. Y. 297. In this case the opinion of Selden, J., interestingly and instructively discusses the subject and reviews many English cases; the conclusion reached being that the code requires the defendant to plead any new matter constituting either an entire or partial defense, and prohibits him from giving such matter in evidence upon the assessment of damages when not set up in the answer. *Skipwith v.*

*Morton*, 3 Cal. 234. See *Edson v. Delage*, 8 How. Pr. 273. But see *Hirsch v. Caler*, 21 Cal. 71; *Davaney v. Egenhoff*, 43 id. 397.

In Kentucky it is considered to be settled that a partial payment on or before the day on which the debt is due may be pleaded; and full payment after the day is pleadable by statute; but the courts there have not gone so far as to sanction a plea of partial payment after the day, but have decided that it cannot be pleaded. *Gearhart v. Olmstead*, 7 Dana, 445; *McWaters v. Draper*, 5 T. B. Mon. 494; *Young v. Park*, 6 J. J. Marsh. 540; *Craigs v. Whips*, 1 Dana, 375. Nor is either partial or full payment after the day provable under

leges non-payment and must establish it to show a cause of action, payment may be proven under a general denial.<sup>1</sup> Under [390-396] a general allegation of payment the defendant may, in some jurisdictions, give in evidence any facts which in law amount to payment;<sup>2</sup> while in others only such facts can be shown as tend to establish a common-law or actual payment.<sup>3</sup> A plea of payment need not allege the amount paid, the date of payment nor the person who received it;<sup>4</sup> under such plea partial payment may be proven.<sup>5</sup> But if payment in property is relied on the answer must be specific as to its value.<sup>6</sup> And this is necessary in some cases where partial payment is admitted and the suit is on a contract for the payment of money. The defendant may plead a payment in excess of the admission, but should allege the amount paid and not merely that the plaintiff has been fully paid as to some or all of the items of the demand, especially where the amount payable is dependent upon another amount, also traversable.<sup>7</sup> An allegation of the place of payment is surplusage and will not preju-

the general issue. *Hamilton v. Coons*, 5 Dana, 317.

When the petition states facts constituting the plaintiff's claim a general denial does not present an issue authorizing the defendant to prove payment. *St. Louis, etc. R. Co. v. Grove*, 39 Kan. 731, 18 Pac. Rep. 958.

<sup>1</sup> *Knapp v. Roche*, 94 N. Y. 329; *Quin v. Lloyd*, 41 id. 349; *McElwee v. Hutchinson*, 10 S. C. 436; *State v. Roche*, 94 Ind. 372; *Robertson v. Robertson*, 37 Oreg. 339, 62 Pac. Rep. 377; *Marley v. Smith*, 4 Kan. 155; *State v. Peterson*, 142 Mo. 526, 39 S. W. Rep. 453.

<sup>2</sup> *Edmunds v. Black*, 13 Wash. 490, 43 Pac. Rep. 330; *Bush v. Sprout*, 43 Ark. 416; *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211; *Hart v. Crawford*, 41 Ind. 197; *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69; *Whittington v. Roberts*, 4 T. B. Mon. 173. See *Day v. Clarke*, 1 A. K. Marsh. 521.

<sup>3</sup> *Lovegrove v. Christman*, 164 Pa. 390, 30 Atl. Rep. 385.

This doctrine is said to have no application to suits in justices' courts. *Rider v. Culp*, 68 Mo. App. 527.

An equitable defense cannot be proven without leave and upon notice. *Steiner v. Erie Dime Savings & L. Co.*, 98 Pa. 491; *Hawk v. Geddis*, 16 S. & R. 28.

In Massachusetts the discharge of a note payable in money by the delivery and acceptance of property must be the result of a subsequent and independent agreement resting upon substantial facts which the answer must set forth. *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. Rep. 736.

<sup>4</sup> *Johnson v. Breedlove*, 104 Ind. 521, 6 N. E. Rep. 906; *Stacy v. Coleman*, 10 Ky. L. Rep. 78 (Ky. Super. Ct.).

<sup>5</sup> *Keyes v. Fuller*, 9 Ill. App. 528; *State v. Roche*, 94 Ind. 372.

<sup>6</sup> *Choate v. Hoogstraet*, 46 C. C. A. 174, 105 Fed. Rep. 713.

<sup>7</sup> *Shipman v. State*, 43 Wis. 381.

dice.<sup>1</sup> It has been held in Kentucky not necessary for a jury, when sworn on an inquiry of damages, or, indeed, on the trial of an issue, to notice credits indorsed on a note, unless under the issue of payment; but under the practice in that state whenever a note on which an action is brought is filed the courts of original jurisdiction notice it so far as to cause the clerk to note on the record all credits indorsed thereon as credits on the judgment, and this after a writ of inquiry or verdict [397] when the jury has not noticed them.<sup>2</sup> Payment of a debt and costs while suit is pending for its recovery extinguishes the claim.<sup>3</sup> Payment is an affirmative defense and must be pleaded.<sup>4</sup> Such defense may be made to an action upon contract under an answer to a declaration in set-off alleging that if the defendant shall prove that the plaintiff ever owed the defendant the amounts alleged, he has paid the same in full.<sup>5</sup> The party alleging payment has the *onus*; and if it is claimed that payment was made in anything but money he has also the burden of proving that what was received was taken in satisfaction and at the creditor's risk.<sup>6</sup> Under a plea of payment the laws of the state in which the note sued upon was made may be received in evidence to show that such note was there paid and extinguished by another note.<sup>7</sup>

§ 233. Evidence of payment. Possession of the evidence of debt is presumptive evidence of authority to receive pay-

<sup>1</sup> Brown v. Gooden, 16 Ind. 444.

<sup>2</sup> Phelps v. Taylor, 4 T. B. Mon. 170.

<sup>3</sup> Root v. Ross, 29 Vt. 488.

<sup>4</sup> Gregory v. Hart, 7 Wis. 532, 540; Martin v. Pugh, 23 id. 184; Hawes v. Woolcock, 30 id. 213; Rossiter v. Schultz, 62 id. 655, 22 N. W. Rep. 839; Christian v. Bryant, 102 Ga. 561, 27 S. E. Rep. 666; Hander v. Baade, 16 Tex. Civ. App. 119, 40 S. W. Rep. 422.

<sup>5</sup> Goss v. Calkins, 164 Mass. 546, 24 N. E. Rep. 96; Swett v. Southworth, 125 Mass. 417.

An allegation of payment made upon information and belief is good. First Nat. Bank v. Roberts, 2 N. D. 195, 49 N. W. Rep. 722.

<sup>6</sup> Atkinson v. Linden Steel Co., 138 Ill. 187, 27 N. E. Rep. 919; Marshall &

Ilsley Bank v. Child, 76 Minn. 173, 78 N. W. Rep. 1048; Griffith v. Creighton, 61 Mo. App. 1; Godfrey v. Crisler, 121 Ind. 203, 22 N. E. Rep. 999; Cheltenham Stone & G. Co. v. Gates Iron Works, 124 Ill. 623, 16 N. E. Rep. 923; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Brown v. Olmsted, 50 Cal. 162; Bradley v. Harwi, 43 Kan. 314, 23 Pac. Rep. 566; Runyon v. Snell, 116 Ind. 164, 9 Am. St. 839, 18 N. E. Rep. 522; McWilliams v. Phillips, 71 Ala. 80; Insurance Co. v. Dunscomb, 108 Tenn. 724, 735, 69 S. W. Rep. 335.

<sup>7</sup> Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. Rep. 1137, 38 Am. St. 536.

ment.<sup>1</sup> But, as evidence of agency, the presumption ceases on the death of the principal.<sup>2</sup> So possession of the evidence of debt by the maker, or one who succeeds to his rights or estate, is *prima facie* evidence of payment.<sup>3</sup> Thus the possession of a bank check by the bank on which it is drawn is such evidence that the bank has paid it.<sup>4</sup> The possession of a canceled check by the drawer who testifies that on the day of its date he made and delivered it to the payee in payment of a debt is sufficient *prima facie* proof of the payment of the amount it calls for.<sup>5</sup> It is presumed, where a check payable to bearer was one day the property of A. and the following day was in the possession and apparent ownership of B., that it was delivered by A. to B. in payment of a debt, though it is not presumed that the transfer was direct.<sup>6</sup> Possession of the evidence of the indebtedness by the payee is *prima facie* proof that the debt has not been paid.<sup>7</sup> The execution and delivery of a deed which acknowledges the receipt of the purchase-money, in the absence of any other proof, is *prima facie* evidence of its payment.<sup>8</sup> But possession of a note by the maker is such evidence only after maturity;<sup>9</sup> nor is the presumption of payment from such possession rebutted by proof of the mere fact that the payee or former holder is dead.<sup>10</sup> The force of the presumption varies with the circumstances of the case in which it is sought to be applied; and the amount of evidence necessary to over-

<sup>1</sup> Lochenmeyer v. Fogarty, 112 Ill. 572; Williams v. Walker, 2 Sandf. Ch. 325; Megary v. Funtis, 5 id. 376. See § 231.

<sup>2</sup> Id.

<sup>3</sup> Gibbon v. Featherstonhaugh, 1 Stark. 92; Hollenberg v. Lane, 47 Ark. 394, 1 S. W. Rep. 687; Potts v. Coleman, 67 Ala. 221; Grimes v. Hilliary, 150 Ill. 141, 36 N. E. Rep. 977; Smith v. Gardner, 36 Neb. 741, 55 N. W. Rep. 245.

When such presumption arises it is inferred that payment was made to a person authorized to receive it. Lipscomb v. De Lanos, 68 Ala. 592.

<sup>4</sup> Wilson v. Goodin, Wright, 219.

<sup>5</sup> Peavy v. Hovey, 16 Neb. 416, 20 N.

W. Rep. 272; Magruder v. De Haven's Adm'r, 21 Ky. L. Rep. 580, 52 S. W. Rep. 795.

<sup>6</sup> Poucher v. Scott, 98 N. Y. 422. See Stimson v. Vroman, 99 id. 74.

<sup>7</sup> Keyes v. Fuller, 9 Ill. App. 528; Humpeler v. Hickman, 13 id. 537; Brooks v. Holt, 65 Mo. App. 613.

<sup>8</sup> Crowe v. Colbeth, 63 Wis. 643, 24 N. W. Rep. 478; Coles v. Soulsby, 21 Cal. 47; Kinster v. Babcock, 26 N. Y. 378; Clark v. Deshon, 12 Cush. 589.

<sup>9</sup> Erwin v. Shaffer, 9 Ohio St. 43; Baring v. Clark, 19 Pick. 220; McGee v. Prouty, 9 Met. 547, 43 Am. Dec. 409. See Heald v. Davis, 11 Cush. 319.

<sup>10</sup> Larimore v. Wells, 29 Ohio St. 13.

come it is, in general, for the jury.<sup>1</sup> A debtor's books of accounts are not evidence to prove payments made by him to his creditor.<sup>2</sup>

"A bond and mortgage taken for the same debt, though distinct securities possessing dissimilar attributes and subject to remedies which are as unlike as personal actions and proceedings *in rem*; are, nevertheless, so far one that payment of either discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties;" hence, an acknowledgment upon the record of full satisfaction of the mortgage, no mention being made of the debt or the bond, *prima facie* imports the extinguishment of the debt.<sup>3</sup>

The receipt of rent for a specified period is presumptive evidence of the payment of previous rent.<sup>4</sup> So of taxes.<sup>5</sup> So where A., in consideration of a bill of goods sold to him by B., agreed to pay the amount of the bill in discharge of certain notes signed by B. and indorsed by A., it is like evidence of the payment of a previous indebtedness of B. to A.<sup>6</sup>

If a debtor is placed in an official or fiduciary relation, in which it becomes his duty to receive money, the law will in general presume payment of the debt — but the presumption may be rebutted.<sup>7</sup> Payment received on Sunday, though in violation of the law for the observance of that day, if it is retained, is good.<sup>8</sup>

An indorsement of credit on an evidence of debt by [398] the payee, within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption;<sup>9</sup> but for that purpose it has reference to the time when such payment purports to have been made.<sup>10</sup> No

<sup>1</sup> Grimes v. Hilliary, 150 Ill. 141, 36 N. E. Rep. 977; Gray v. Gray, 47 N. Y. 552; Larimore v. Wells, 29 Ohio St. 13.

<sup>2</sup> Hess' Appeal, 112 Pa. 168, 4 Atl. Rep. 340.

<sup>3</sup> Fleming v. Parry, 24 Pa. 47; Seiple v. Seiple, 133 id. 460, 19 Atl. Rep. 406.

<sup>4</sup> Brewer v. Knapp, 1 Pick. 332.

<sup>5</sup> Attleborough v. Middleborough, 10 Pick. 378.

<sup>6</sup> Colvin v. Carter, 4 Ohio, 354.

<sup>7</sup> Wilson v. Wilson, 17 Ohio St. 150, 91 Am. Dec. 125. See § 222.

<sup>8</sup> Johnson v. Willis, 7 Gray, 164; Shields v. Klopff, 70 Wis. 69, 35 N. W. Rep. 284; Jameson v. Carpenter, 68 N. H. 62, 36 Atl. Rep. 554.

<sup>9</sup> Dabney's Ex'r v. Dabney's Adm'r, 2 Rob. (Va.) 622, 40 Am. Dec. 761.

<sup>10</sup> Hayes v. Morse, 8 Vt. 316.

presumption of payment arises from the fact of long delay in prosecuting a claim because the alleged debtor had property near the creditor's place of residence if such property could not have been reached without giving a bond.<sup>1</sup> In England "where a person serves in the capacity of a domestic servant, and no demand for the payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid, or that the service was performed on the footing that no payment was to be made."<sup>2</sup> This doctrine is fully recognized in Pennsylvania.<sup>3</sup>

## SECTION 2.

### APPLICATION OF PAYMENTS.

**§ 234. General rule.** The general rule on this subject is that a debtor paying money to a creditor to whom he owes several debts may appropriate it to which he pleases. In the absence of an appropriation by the debtor the creditor has a right to make the application. If both omit to make an appropriation the law will apply it according to the justice and equity of the case.<sup>4</sup> That some of the claims are secured is

<sup>1</sup> *Ludwig v. Blackshere*, 102 Iowa, 366, 71 N. W. Rep. 356.

<sup>2</sup> *Sellen v. Norman*, 4 C. & P. 80; *Gough v. Findon*, 7 Ex. 49.

<sup>3</sup> *Taylor v. Beatty*, 202 Pa. 120, 125, 51 Atl. Rep. 771.

<sup>4</sup> *National Bank v. Bigler*, 83 N. Y. 51; *Wetherell v. Joy*, 40 Me. 325; *Thayer v. Denton*, 4 Mich. 192; *Hall v. Constant*, 2 Hall, 185; *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Parker v. Green*, 8 Met. 137; *Truscott v. King*, 6 N. Y. 147; *Stewart v. Hopkins*, 30 Ohio St. 502; *McDaniel v. Barnes*, 5 Bush, 183; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Reed v. Boardman*, 20 Pick. 441; *Shaw v. Picton*, 4 B. & C. 715; *Scott v. Fisher*, 4 T. B. Mon. 387; *Bayley v. Wynkoop*, 10 Ill. 449; *Nutall's Adm'r v. Brannin's Ex'r*, 5 Bush, 11; *Hall v. Marston*, 17 Mass. 575; *Goddard v.*

*Cox*, 2 Str. 1194; *Peters v. Anderson*, 5 Taunt. 596; *Bosanquet v. Wray*, 6 id. 597; *Brooke v. Enderby*, 2 B. & B. 70; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Brady's Adm'r v. Hill*, 1 Mo. 315; *Sprinkle v. Martin*, 72 N. C. 92; *Dent v. State Bank*, 12 Ala. 375; *Wooten v. Buchanan*, 49 Miss. 386; *Hamilton v. Benbury, Mart. & Hayw.* 586; *James v. Malone*, 1 Bailey, 334; *Mills v. Kellogg*, 7 Minn. 469; *Bohe v. Stickney*, 36 Ala. 492; *Dennis v. McLaurin*, 31 Miss. 606; *Gaston v. Barney*, 11 Ohio St. 506; *Jones v. Smith*, 22 Mich. 360; *Waterman v. Younger*, 49 Mo. 413; *Starrett v. Barber*, 20 Me. 457; *Irwin v. Paulett*, 1 Kan. 418; *Pearl v. Clark*, 2 Pa. 350; *Moorehead v. West Branch Bank*, 3 W. & S. 550; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 459; *Whetmore v. Murdock*, 3 Woodb. & M. 390; *Dulles v. De Forest*, 19 Conn.



immaterial so far as the right of either party to make the application is concerned.<sup>1</sup>

§ 235. By debtor. The right of the debtor who [399] makes a voluntary payment to direct how it shall be applied is absolute if he signifies his election at the time of making it.<sup>2</sup> He will not lose that right unless he has an opportunity to exercise it and neglects to do so.<sup>3</sup> The rule is the same in respect to a partial payment accepted by the creditor.<sup>4</sup> The direction of the debtor may be inferred from circumstances,

190; Souder v. Schechterly, 91 Pa. 83; Clarke v. Scott, 45 Cal. 86; Hargroves v. Cooke, 15 Ga. 321; Haynes v. Nice, 100 Mass. 327; Cardinell v. O'Dowd, 43 Cal. 586; Putnam v. Russell, 17 Vt. 54. 42 Am. Dec. 478; Robson v. McKoin, 18 La. Ann. 544; Early v. Flannery, 47 Vt. 253; Holmes v. Pratt, 34 Ga. 558; McMillan v. Grayston, 83 Mo. App. 425; Underhill v. Wynkoop, 15 Pa. Super. Ct. 230; Burnett v. Sledge, 129 N. C. 114, 39 S. E. Rep. 775.

<sup>1</sup> Post-Intelligencer Pub. Co. v. Harris, 11 Wash. 500, 39 Pac. Rep. 965; Wood v. Callaghan, 61 Mich. 402, 28 N. W. Rep. 162, 1 Am. St. 597; Arbuckles v. Chadwick, 146 Pa. 393, 23 Atl. Rep. 346.

<sup>2</sup> Eppinger v. Kendrick, 114 Cal. 620, 46 Pac. Rep. 613; Longworth v. Aslin, 106 Mo. 155, 17 S. W. Rep. 294; Brown v. Brown, 124 Mo. 79, 27 S. W. Rep. 552; Koch v. Roth, 150 Ill. 212, 226, 37 N. E. Rep. 317; Adersholt v. Embry, 78 Ala. 185; McCurdy v. Middleton, 82 id. 131, 2 So. Rep. 721; Baldwin v. Flash, 59 Miss. 61; Miles v. Ogden, 54 Wis. 573, 12 N. W. Rep. 81; Long v. Miller, 93 N. C. 233; Libby v. Hopkins, 104 U. S. 303; Washington N. Gas Co. v. Johnson, 123 Pa. 576, 16 Atl. Rep. 799; Bray v. Crain, 59 Tex. 649; Robinson v. Doolittle, 12 Vt. 246; Wendt v. Ross, 33 Cal. 650; Gaston v. Barney, 11 Ohio St. 506; Selleck v. Sugar Hollow Turnpike Co., 13 Conn. 453; Reynolds

v. McFarlane, 1 Overt. 458; McDaniel v. Barnes, 5 Bush, 183; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 133; Bosley v. Porter, 4 J. J. Marsh. 621; Parker v. Green, 8 Met. 144; Mann v. Marsh, 2 Cal. 99; Trotter v. Grant, 2 Wend. 413; Allen v. Culver, 3 Denio, 284; Van Rensselaer v. Roberts, 5 id. 470; Walther v. Wetmore, 1 E. D. Smith, 7; Pattison v. Hull, 9 Cow. 747; Baker v. Stackpoole, id. 420, 18 Am. Dec. 508; Webb v. Dickinson, 11 Wend. 62; Stone v. Seymour, 15 id. 19.

Payments made by an agent to his principal's creditor after the death of the principal cannot be applied to the discharge of indebtedness existing before his death in a proceeding against the testator's estate, at least when the estate is insolvent. Gifford v. Thomas' Estate, 62 Vt. 34, 19 Atl. Rep. 1088.

Under the Louisiana code a debtor who has the opportunity of ascertaining that his creditor has made an application cannot, after failing to avail himself of the right to object thereto and allowing a long time to pass, be heard to ask for a different application. Baker v. Smith, 44 La. Ann. 925, 11 So. Rep. 585.

<sup>3</sup> Jones v. Williams, 39 Wis. 300; Waller v. Lacy, 1 M. & G. 54; 2 Pars. on Cont. 631.

<sup>4</sup> Gaston v. Barney, 11 Ohio St. 506; Wetherell v. Joy, 40 Me. 325.

and if his intention can thus be shown it is of the same force as though it had been expressed.<sup>1</sup> The intention to appropriate [400] a payment to a particular debt may be collected from the nature of the transaction, and be referred to the jury as a question of fact.<sup>2</sup> Thus, where two charges of unequal amounts exist, one legal and the other illegal, the former not due, and a general payment of an amount not in excess of the illegal claim is made on account, it was held to have been paid upon that claim although there was no direction given.<sup>3</sup> And so where a payment is made to a creditor who holds an original claim against the debtor, of which the latter has knowledge, and also claims which have been purchased without the debtor's knowledge, it will be presumed that the payment was intended to be applied upon the former.<sup>4</sup> If the debtor, at the time of making the payment, makes an entry in his own book, stating that it is upon a particular demand, and shows the entry to the creditor, it is a sufficient appropriation.<sup>5</sup> The fact of the entries being made must be communicated to the debtor,<sup>6</sup> unless the right to make them was exercised pursuant to a previous direction.<sup>7</sup> The proper time to direct the application of the proceeds of personal property delivered or consigned to a lienee for sale is when the delivery or consignment is made.<sup>8</sup>

<sup>1</sup> *Snell v. Cottingham*, 72 Ill. 124; *Taylor v. Sandiford*, 7 Wheat. 13; *Mayor v. Patten*, 4 Cranch, 317; *Terhune v. Colton*, 12 N. J. Eq. 233, 312; *Howland v. Rench*, 7 Blackf. 236; *Mitchell v. Dall*, 2 Har. & G. 159; *Robinson v. Doolittle*, 12 Vt. 246; *Shaw v. Picton*, 4 B. & C. 715; *Scott v. Fisher*, 4 T. B. Mon. 387; *Keane v. Branden*, 12 La. Ann. 20; *Smuller v. Union Canal Co.*, 37 Pa. 68; *Lanten v. Rowan*, 59 N. H. 215; *Roakes v. Bailey*, 55 Vt. 542; *Bray v. Crain*, 59 Tex. 649; *Hansen v. Rounsavell*, 74 Ill. 238; *Plain v. Roth*, 107 id. 588.

<sup>2</sup> *Pritchard v. Comer*, 71 Ga. 18; *West Branch Bank v. Morehead*, 5 W. & S. 542; *Morehead v. West Branch Bank*, 3 id. 550.

Paying money on account, with-

out specifying any particular account, is not an application of it, the payer owing the creditor on more than one account. *Orr v. Nagle*, 87 Hun, 12, 33 N. Y. Supp. 879.

<sup>3</sup> *Caldwell v. Wentworth*, 14 N. H. 431; *Frazer v. Bunn*, 8 C. & P. 704; *Dorsey v. Wayman*, 6 Gill, 59. See *McCarty v. Gordon*, 16 Kan. 35.

<sup>4</sup> *Holley v. Hardeman*, 76 Ga. 328; *Moose v. Marks*, 116 N. C. 785, 21 S. E. Rep. 561.

<sup>5</sup> *Frazer v. Bunn*, 8 C. & P. 704.

<sup>6</sup> *Reiss v. Scherner*, 87 Ill. App. 84.

<sup>7</sup> *First Nat. Bank v. Roberts*, 2 N. D. 195, 49 N. W. Rep. 722.

<sup>8</sup> *Bell v. Bell*, 20 S. C. 34; *Frost v. Weathersbee*, 23 id. 368; *Baum v. Trantham*, 42 S. C. 104, 19 So. Rep. 973, 46 Am. St. 697.

But this right of the debtor to elect to which of several debts a payment shall be applied is confined to voluntary payments. It does not extend to moneys collected by legal process.<sup>1</sup> The right of the debtor to so direct, however, cannot be defeated by the creditor obtaining possession of the debtor's funds without his consent, except by legal proceedings binding upon him. Where a debtor intrusted funds to an agent with directions to apply them by way of compromise in satisfaction of two demands held against him by the same person, and the creditor, knowing this fact, levied an attachment on the money so confided to the agent, and also on the money of the agent, and thereupon the latter, to regain possession of his own money, assented, under protest, to the application of the debtor's money to one of the debts which was unsecured, it was held not binding upon the debtor, and he was allowed, when afterwards sued, to apply it to either at his option.<sup>2</sup> So where a surety sends money by the principal to the creditor, and such principal so informs the creditor, they can make no other application than that directed by the surety.<sup>3</sup>

Where money is paid by the principal debtor a surety cannot interfere to control the application contrary to the intention of the party paying.<sup>4</sup> Nor can subsequent incumbrancers control the application of moneys made by the parties to earlier liens.<sup>5</sup> But sureties on official bonds will not be rendered liable as for defalcation by application of funds received in their time to cancel prior balances or defalcations.<sup>6</sup> Nor

<sup>1</sup> *Blackstone Bank v. Hill*, 10 Pick. 129; *Barrett v. Lewis*, 2 Pick. 123; *Wooten v. Buchanan*, 49 Miss. 386; *Forelander v. Hicks*, 6 Ind. 448; *Nichols v. Knowles*, 3 McCrary, 477, 17 Fed. Rep. 494; *Monson v. Meyer*, 190 Ill. 105, 60 N. E. Rep. 63, 92 Ill. App. 127.

<sup>2</sup> *Dennis v. McLaurin*, 31 Miss. 606; *Pearl v. Clark*, 2 Pa. 350.

<sup>3</sup> *Reed v. Boardman*, 20 Pick. 441. See *Lansdale v. Graves*, *Sneed*, 215.

<sup>4</sup> *Mathews v. Switzler*, 46 Mo. 301; *Gaston v. Barney*, 11 Ohio St. 506; *Field v. Holland*, 6 Cranch, 8; *Allen v. Jones*, 8 Minn. 202.

<sup>5</sup> *Richardson v. Washington Bank*, 3 Met. 536; *Mills v. Kellogg*, 7 Minn. 469. But see *Green v. Tyler*, 39 Pa. 361.

<sup>6</sup> In *United States v. Eckford's Ex'r*, 1 How. 250, *McLean, J.*, said: "The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in

will an intention of the principal debtor to apply a payment in favor of a surety be presumed, and thus exclude the right of the creditor to make the application.<sup>1</sup> The right of a debtor to apply money regardless of his surety exists only where the payment is made by his own funds free from any equity in favor of the surety to have the application made in payment of the debt for which he is liable. Where the specific money paid to the creditor and applied on a debt of the principal, for which the surety is not held, is the money for the collection and payment of which the surety is bound, the latter is entitled to have the money applied to the payment of the debt for which he is surety unless the creditor shows a superior equity to sustain the application made. The surety has the burden of showing that the application made is inequitable to him.<sup>2</sup> The absolute right of directing the application of payments which a debtor has does not pass to his personal representative; nor does it pertain to any one making payments in a fiduciary capacity.<sup>3</sup> If the terms of an express trust do

which debits and credits are entered as they occur, and without any express appropriation of payments, affect the right of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the parties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector,

and by such appropriation hold the sureties bound for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration." *Jones v. United States*, 7 How. 681; *Boody v. United States*, 1 Woodb. & M. 150; *Postmaster-General v. Norvell*, Gilpin, 106; *United States v. January*, 7 Cranch, 572; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 id. 19; *United States v. Linn*, 2 McLean, 501.

<sup>1</sup>*Smith's Merc. L.* 672; *Plomer v. Long*, 1 Stark. 153; *Hargroves v. Cooke*, 15 Ga. 321; *Clark v. Burdett*, 2 Hall, 197; *James v. Malone*, 1 Bailey, 334. See *Lansdale v. Graves*, Sneed, 215; *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52.

<sup>2</sup>*Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. Rep. 624.

<sup>3</sup>*Putnam v. Russell*, 17 Vt. 54, 42 Am. Dec. 478; *Barrett v. Lewis*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325.

not determine the order of payments, their order, it is believed, must be fixed by law.

A series of cases in Pennsylvania have dealt with the right of members of building and loan associations to direct the application of payments made to the latter. Originally it was determined that all payments were to be credited to the debt created by the loan made to the member.<sup>1</sup> But this doctrine was qualified, and was not to be regarded as laying down the rule that payment of dues on the stock, *ipso facto*, works an extinguishment of so much of the mortgage. "The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage."<sup>2</sup> The right of the debtor to direct the application of the payments on the stock to the extinguishment of the debt is now recognized if the rights of creditors, based on the assignment of the stock, are not affected,<sup>3</sup> or legal process has not been resorted to or insolvency has not intervened.<sup>4</sup> An application made at the inception of the contract for the loan cannot be subsequently interfered with.<sup>5</sup> Where a borrowing member of such an association gives it his obligation for the payment of the principal debt in equal monthly instalments until the whole is paid, according to the statute and the rules of the association, such instalments cannot be appropriated to a direct payment on account of the loan with the effect of leaving dues on the stock unpaid.<sup>6</sup>

§ 236. Same subject. An agreement between debtor and creditor for a particular application of moneys expected from

But in *Marshall v. Nagel*, 1 Bailey, 308, it was held that if a debtor pays a sum of money on account of distinct debts due to different creditors to a common agent of all the creditors, and gives no directions as to the order in which the money is to be applied to the debts, the agent may make the application according to his discretion and the debtor will be bound by it. *Carpenter v. Goin*, 19 N. H. 479.

<sup>1</sup> *Kupfert v. Guttenberg Building Ass'n*, 30 Pa. 465; *Hughes's Appeal*, id. 471.

<sup>2</sup> *Building Ass'n v. Sutton*, 35 Pa. 463, 78 Am. Dec. 349.

<sup>3</sup> *Wadlinger v. Washington German B. & L. Ass'n*, 153 Pa. 622, 26 Atl. Rep. 647.

<sup>4</sup> *Strohen v. Franklin Savings & Loan Ass'n*, 115 Pa. 273, 8 Atl. Rep. 843; *York Trust, Real Estate & Deposit Co. v. Gallatin*, 186 Pa. 150, 40 Atl. Rep. 317.

<sup>5</sup> *York, etc. Co. v. Gallatin*, *supra*.

<sup>6</sup> *Freemansburg Building & L. Ass'n v. Watts*, 199 Pa. 221, 48 Atl. Rep. 1075.

a specific source will preclude any diversion by either, without the consent of the other, when the money is received.<sup>1</sup> Thus, where money is realized by a creditor from a collateral security for a debt, such money is deemed appropriated to that debt.<sup>2</sup> The plaintiff, an equitable mortgagee for 600%, lent the title deeds of the property to the defendant E., the mortgagor, to enable him to negotiate a sale of it, the deeds to be returned. E. paid plaintiff 300% received by him as part of the purchase-money; afterwards E. became bankrupt. Before such payment was made E. was indebted to the plaintiff on a trade account for a larger amount. E. made no application of the 300% he paid, and the plaintiff contended that he might apply it to the trade account, thus leaving the mortgage undischarged. This contention was disapproved of, it being inferable from the nature of the transaction that E. made the payment only in respect to the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood that the payer meant the money to be applied toward the satisfaction of the mortgage.<sup>3</sup> If money is advanced by a factor to

<sup>1</sup>Thompson v. Hudson, L. R. 6 Ch. 320; Lansdale v. Mitchell, 14 B. Mon. 348; Hughes v. McDougale, 17 Ind. 399; King of Spain v. Oliver, Pet. C. C. 276; Sproule v. Samuel, 5 Ill. 135; Stackpole v. Keay, 45 Me. 297; Gwathney v. McLane, 3 McLean, 371; White v. Toles, 7 Ala. 569; Smith v. Wood, 1 N. J. Eq. 74; Hahn v. Geiger, 96 Ill. App. 104; Hansen v. Rounsavell, 74 Ill. 238. See § 235, last paragraph.

In Ross v. Crane, 74 Iowa, 375, 37 N. W. Rep. 959, the purchaser of a note and mortgage agreed with their maker in writing to employ him and apply his wages in payment of the mortgage debt. After money enough had been earned to pay the mortgage the holder applied the amount to another account and assigned the security and the note to a third person. The agreement was held binding and the debt to have been satisfied before the assignment was made.

<sup>2</sup>Howard v. Schwartz, 22 Tex. Civ.

App. 400, 55 S. W. Rep. 348; Caldwell v. Hall, 49 Ark. 508, 1 S. W. Rep. 63; Strickland v. Hardie, 82 Ala. 412, 3 So. Rep. 40; Greer v. Turner, 47 Ark. 17, 14 S. W. Rep. 383; Pritchard v. Comer, 71 Ga. 18; Hatcher v. Comer, 73 id. 418; Taylor v. Cockrell, 80 Ala. 236; Marziou v. Pioche, 8 Cal. 522; Buckley v. Garrett, 47 Pa. 280; Sanford v. Clark, 29 Conn. 457; Masten v. Cummings, 24 Wis. 623; Cross v. Johnson, 30 Ark. 396; McCune v. Belt, 45 Mo. 174; Paine v. Bonney, 6 Abb. Pr. 99; Donally v. Wilson, 5 Leigh, 329; Windsor v. Kennedy, 53 Miss. 164; Hicks v. Bingham, 11 Mass. 300; Hall v. Marston, 17 Mass. 575. See Green v. Ford, 79 Ga. 130; Baum v. Frantham, 24 S. C. 104.

<sup>3</sup>Young v. English, 7 Beav. 10; Buster v. Holland, 27 W. Va. 510, 533. See Stoveld v. Eade, 4 Bing. 154; Waters v. Tompkins, 2 Cr., M. & R. 273; Pearl v. Deacon, 24 Beav. 186.

purchase property, upon the security of its being shipped to him, it will be implied that the advances were made upon the condition that they should be paid out of the proceeds of the property; after the factor has obtained possession of it the debtor cannot direct the application of the amount realized from it to another debt.<sup>1</sup> But the agreement to control the debtor's choice must be such as to give the creditor a right in the nature of a lien which can be specifically enforced.<sup>2</sup>

Where the debtor has directed the application of his payment to a particular debt, he has a right to treat it as actually so applied. The debt will be deemed extinguished to the extent of such payment.<sup>3</sup> The creditor has no option to disregard the direction,<sup>4</sup> and no different application by him will avail unless afterwards ratified or acquiesced in by the [403] debtor;<sup>5</sup> nor will the direction of the latter be overruled or changed in equity.<sup>6</sup> After a debtor has made application of a

<sup>1</sup> *Frost v. Weathersbee*, 23 S. C. 354.

<sup>2</sup> *Whitney v. Traynor*, 74 Wis. 289, 42 N. W. Rep. 267; *Stewart v. Hopkins*, 30 Ohio St. 502. See *Mellendy v. Austin*, 69 Ill. 15; *Clarke v. Scott*, 45 Cal. 86.

<sup>3</sup> *Libby v. Hopkins*, 104 U. S. 303; *Washington N. Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. Rep. 799; *Lauten v. Rowan*, 59 N. H. 215; *Irwin v. Paulett*, 1 Kan. 418.

<sup>4</sup> *Runyon v. Latham*, 5 Ired. 551; *Wetherell v. Joy*, 40 Me. 325; *Scott v. Fisher*, 4 T. B. Mon. 387; *Blanton v. Rice*, 5 id. 253; *Rugeley v. Smalley*, 12 Tex. 238; *Farmers', etc. Bank v. Franklin*, 1 La. Ann. 393; *Stewart v. Hopkins*, 30 Ohio St. 502; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21, 28 Am. Dec. 616.

<sup>5</sup> *Sherwood v. Haight*, 26 Conn. 432; *Jackson v. Bailey*, 12 Ill. 159; *Forelander v. Hicks*, 6 Ind. 448; *Semmes v. Boykin*, 27 Ga. 47; *Hall v. Marston*, 17 Mass. 575; *Solomon v. Dreschler*, 4 Minn. 278; *Taylor v. Sandiford*, 7 Wheat. 13; *Bonaffe v. Woodberry*, 12 Pick. 463; *Hussey v. Manufacturers', etc. Bank*, 10 Pick. 415; *Blood-*

*worth v. Jacobs*, 2 La. Ann. 24; *Adams v. Bank*, 3 id. 351; *Robson v. McKoin*, 18 id. 544; *Treadwell v. Moore*, 34 Me. 112; *Black v. Shooler*, 1 McCord, 293; *Martin v. Draher*, 5 Watts 544; *Mitchell v. Dall*, 2 Har. & G. 159; *McDonald v. Pickett*, 2 Bailey, 617; *Reed v. Boardman*, 20 Pick. 441; *McKee v. Stroup*, 1 Rice, 291; *Moorehead v. West Branch Bank*, 3 W. & S. 550; *Jones v. Perkins*, 29 Miss. 139; *Smith v. Wood*, 1 N. J. Eq. 74; *Cardinell v. O'Dowd*, 43 Cal. 586.

<sup>6</sup> *Selfridge v. Northampton Bank*, 8 W. & S. 320.

It has been held that the debtor cannot impute a payment to principal when interest is due thereon without first paying the interest. *Johnson v. Robbins*, 20 La. Ann. 569. This may be doubted if the creditor receives the money. Unless the interest was due as damages, it might, notwithstanding, be recovered. See *Williams v. Houghtaling*, 3 Cow. 86; *Pindall v. Bank of Marietta*, 10 Leigh, 484.

payment he cannot himself revoke it, and apply it otherwise, without the creditor's consent.<sup>1</sup> He will be held to the application made, though it was made for interest on a debt not bearing interest;<sup>2</sup> to a debt on which the statute of frauds does not allow an action to be brought;<sup>3</sup> or to an illegal claim.<sup>4</sup> But where usurious interest has been paid, it is deemed an extortion and the payment may be recovered or applied to the principal debt.<sup>5</sup> A different rule prevails in Ohio,<sup>6</sup> and in the District of [404] Columbia.<sup>7</sup> By mutual consent of the debtor and creditor, where no other parties are interested, the application of a payment may be changed; and in that case the indebtedness first discharged will be revived by implication, without any express promise.<sup>8</sup> If there are other parties interested as a surety,<sup>9</sup>

<sup>1</sup> Long v. Miller, 93 N. C. 233; York Trust, Real Estate & Deposit Co. v. Gallatin, 186 Pa. 150, 40 Atl. Rep. 317.

<sup>2</sup> Beard v. Brooklyn, 31 Barb. 142.

<sup>3</sup> Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109.

<sup>4</sup> Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268; Hubbell v. Flint, 15 Gray, 550; Dorsey v. Wayman, 6 Gill, 59; Richardson v. Woodbury, 12 Cush. 279; Feldman v. Gamble, 26 N. J. Eq. 494; Caldwell v. Wentworth, 14 N. H. 431. See Plummer v. Erskine, 58 Me. 59; Mueller v. Wiebracht, 47 Mo. 468.

A debtor may direct the application of a payment upon an illegal item of the account against him, neither party believing it to be illegal, and the transaction involving it not being *malum in se*, but *malum prohibitum*. Johnston v. Dahlgren, 48 App. Div. 537, 62 N. Y. Supp. 1115, 166 N. Y. 354, 59 N. E. Rep. 987.

<sup>5</sup> Wood v. Lake, 13 Wis. 84, and cases cited; Gill v. Rice, id. 549; Lee v. Peckham, 17 id. 383; Fay v. Lovejoy, 20 id. 403; State Bank v. Enslinger, 7 Blackf. 105; Smead v. Green, 5 Ind. 308; Browning v. Mor-

ris, 2 Cowp. 790; Smith v. Bromley, 2 Doug. 695, note; Williams v. Hedley, 8 East, 378; Wheaton v. Hibbard, 20 Johns. 290, 11 Am. Dec. 284; Burrows v. Cook, 17 Iowa, 436; Stanley v. Westrop, 16 Tex. 200; Parchman v. McKinney, 12 Sm. & M. 631. See Second Nat. Bank v. Fitzpatrick, 23 Ky. L. Rep. 610, 63 S. W. Rep. 459; Citizens' Nat. Bank v. Forman's Assignée, 23 Ky. L. Rep. 613, 63 S. W. Rep. 454.

In an action to recover payments made on account of usury the application to the principal debt will be made as of the date of the writ, if the party who made them so requests. Peterborough Savings Bank v. Hodgdon, 63 N. H. 300.

<sup>6</sup> See Conant v. Seneca County Bank, 1 Ohio St. 298; Shelton v. Gill, 11 Ohio, 417; Graham v. Cooper, 17 id. 605; Williamson v. Cole, 26 Ohio St. 207.

<sup>7</sup> Kendall v. Vanderlip, 2 Mackey, 105.

<sup>8</sup> Rundlett v. Small, 25 Me. 29.

<sup>9</sup> Brockschmidt v. Hagebusch, 72 Ill. 562; Ruble v. Norman, 7 Bush, 532; Ware v. Otis, 8 Me. 387.



co-debtor,<sup>1</sup> or a subsequent incumbrancer,<sup>2</sup> their consent is essential;<sup>3</sup> but a debtor's general creditor cannot be heard to complain.<sup>4</sup>

§ 237. Same subject ; evidence. Parol evidence is admissible to show that at the time a note was given for money lent an agreement was made to pay a certain sum as extra interest and that all the payments made were for such interest and not upon the note.<sup>5</sup> A copy of a letter addressed by a creditor to his debtor, contained in the letter book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase, is not evidence for such creditor in an action against a guarantor to establish that a payment made shortly afterwards by the debtor, who was indebted on several accounts, was made in discharge of such purchase, though the draft itself or evidence of its contents, if lost, accompanied by a letter from the debtor to the creditor regretting his inability to meet the draft, and promising speedy payment of that demand, followed by a payment a few days after the date of such letter, is evidence to show that it was a payment made in discharge of that particular claim.<sup>6</sup> The letter of a debtor, or of his acknowledged general agent, to his creditor, directing him to which of two debts a payment he is about to [405] make shall be applied, is the best evidence to show on what account such payment was received by the creditor.<sup>7</sup> Such an act of the debtor in an action against his guarantor for one of the debts, where several were due, is not considered as merely the declaration of a third person, but it is the act of the party who had the legal right to make the application.<sup>8</sup>

<sup>1</sup>Thayer v. Denton, 4 Mich. 192; Miller v. Montgomery, 31 Ill. 350; Brown v. Brabham, 3 Ohio, 275.

<sup>2</sup>Chancellor v. Schott, 23 Pa. 68; Tooke v. Bonds, 29 Tex. 419.

<sup>3</sup>In a suit to foreclose a mortgage which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments, previously stipulated to be applied to the mortgage debt, to another debt. Held, that the defendant might then prove that the agreement to change the

appropriation was made after he had applied for the benefit of the insolvent laws, and was therefore invalid. Richmond Iron Works v. Woodruff, 8 Gray, 447. See Cremer v. Higginson, 1 Mason, 323; Bank of North America v. Meredith, 2 Wash. C. C. 47.

<sup>4</sup>Whitney v. Traynor, 74 Wis. 289, 42 N. W. Rep. 267.

<sup>5</sup>Rohan v. Hanson, 11 Cush. 44.

<sup>6</sup>Mitchell v. Dall, 2 H. & G. 159.

<sup>7</sup>Id.

<sup>8</sup>Id.

§ 238. **By creditor.** Where the debtor omits to make any appropriation at the time of payment the right to make the application devolves on the creditor. But its exercise is subject to limitations. In one respect, however, it is less restricted than that of the debtor. The creditor is not required to decide at once on receiving the money. Within what time he must exercise the choice has been much discussed. The weight of opinion seems to be that he must make the application within a reasonable time, in view of the circumstances of the particular case, at the latest, before any controversy arises or any material change occurs in the relations of the parties.<sup>1</sup> The bringing of a suit may determine the creditor's election, as

<sup>1</sup> Applegate v. Koons, 74 Ind. 347; Robinson v. Doolittle, 12 Vt. 246; Mills v. Fowkes, 5 Bing. N. C. 455; Philpott v. Jones, 2 Ad. & El. 41; Smith's Merc. L. 650; Peters v. Anderson, 5 Taunt. 596; Norris v. Beaty, 6 W. Va. 477; Bridenbecker v. Lowell, 32 Barb. 9; Haynes v. Waite, 14 Cal. 446; Allen v. Culver, 3 Denio, 284; Parker v. Green, 8 Met. 144; Whetmore v. Murdock, 3 Woodb. & M. 390; United States v. Kirkpatrick, 9 Wheat. 720; Backhouse v. Patton, 5 Pet. 160; Hill v. Southerland, 1 Wash. (Va.) 128; Van Rensselaer v. Roberts, 5 Denio, 470; McCartney v. Buck, 8 Houst. 34, 12 Atl. Rep. 717.

In *Marsh v. Oneida Central Bank*, 34 Barb. 298, it was held that a bank which holds a note against one of its depositors is not bound to apply his deposits immediately when it becomes due. If not made then, and a judgment is recovered on the note, the right to make such application is not thereby waived or lost, and the bank may afterwards avail itself of the right against an assignee of the deposit. See *Long Island Bank v. Townsend*, Hill & Denio, 204; *Mayor v. Patten*, 4 Cranch, 317.

In some cases it is held that an application made after an action has been begun is too late. *Taylor v.*

*Coleman*, 20 Tex. 772; *Sanford v. Van Arsdall*, 53 Hun, 70, 6 N. Y. Supp. 494; *Huffstater v. Hayes*, 64 Barb. 573. But it has been sustained when made after suit brought where it harmonized with the intention of the parties. *Bank of California v. Webb*, 48 N. Y. Super. Ct. 175. It is said in the same case (94 N. Y. 467) that the application may be made any time before the court makes it unless the debtor previously requests the creditor to exercise his right of election.

In South Carolina the creditor has until verdict or judgment to apply the payments. *Heilbron v. Bissell*, Bailey's Eq. \*430; *Price v. Hamilton*, 12 S. C. 32; *Thatcher v. Massey*, 20 id. 542; *Baum v. Trantham*, 42 S. C. 104, 19 So. Rep. 973, 46 Am. St. 697. These cases are rested upon the principle that until the debtor pays the money it is his; and he has the right to control its disposition. After the creditor receives it he may exercise such right, and it continues until the court has exerted its power over the payment.

Whenever the application is made effect must be given to it as of the time the money was received. *Poulson v. Collier*, 18 Mo. App. 583; *Bray v. Crain*, 59 Tex. 649.

where he holds two notes and an unappropriated payment large enough to pay one of them is made, his suit on one of the notes is an election to apply the money to the payment of the other.<sup>1</sup> But if he brings separate suits on them he will not be allowed on the trial of one to elect to apply to the [406] satisfaction of the other a payment previously made, and not before specially applied by either party.<sup>2</sup> If there is no provision given in securities, the payment of which is enforced by law, as to the application of their proceeds the creditor has no right to make an appropriation thereof.<sup>3</sup> A stipulation in a note that if the maker became otherwise indebted to the payee before its payment the latter might apply the first payment to such claims as he chose does not include property taken by virtue of a mortgage securing such note, especially as against sureties on the latter.<sup>4</sup> A creditor cannot appropriate payments after third persons have acquired rights against the debtor, so as to affect their rights if an application can be made which will protect them.<sup>5</sup> In Arkansas the rule is that where there is a single running account in which third persons are not interested, and a general payment is made without application by the debtor, the creditor has no election to make the application; the law applies the payment to the several items of the account in the order of their priority.<sup>6</sup>

A banker is not required to apply a balance due by him on an account current to his depositor upon the liability of such customer on a note or bill. And in a suit by a banker against the acceptor of a bill the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor

<sup>1</sup> *Allen v. Kimball*, 23 Pick. 473; *Starrett v. Barber*, 20 Me. 457; *Bohe v. Stickney*, 36 Ala. 492; *Dent v. State Bank*, 12 Ala. 275.

<sup>2</sup> *Stone v. Talbot*, 4 Wis. 442.

<sup>3</sup> *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. 775, 20 N. E. Rep. 357, 3 L. R. A. 302; *Snider v. Stone*, 78 Ill. App. 17; *Matter of Georgi*, 21 N. Y. Misc. 419, 47 N. Y. Supp. 1061.

It is said in *Sanford v. Van Arsdall*, 53 Hun, 70, 77, 6 N. Y. Supp. 494,

that payments made by a third person, who is not the debtor's agent, are not voluntary, though they were made pursuant to arrangement or understanding between the parties.

<sup>4</sup> *Barrett v. Bass*, 105 Ga. 421, 31 S. E. Rep. 435.

<sup>5</sup> *Willis v. McIntyre*, 70 Tex. 34, 7 S. W. Rep. 594, 8 Am. St. 574.

<sup>6</sup> *Hughes v. Johnson*, 38 Ark. 295; *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. Rep. 430.

of the acceptor to show a payment or satisfaction by the drawer.<sup>1</sup> If a debtor owes to his creditor several debts it is generally said that the creditor may apply a payment which the debtor does not appropriate to either at his pleasure.<sup>2</sup> This is not true in an absolute and unqualified sense. He is not at liberty to apply a payment to a disputed,<sup>3</sup> contingent,<sup>4</sup> or unliquidated demand in preference to one admitted, absolute or certain, nor to one not due in lieu of another past due.<sup>5</sup> Money collected on an execution should be credited on the writ; the plaintiff cannot take a part of it and apply it to an unsecured debt, though it may be that it could have been applied to an execution of older date than that which was levied.<sup>6</sup> This

<sup>1</sup> *Citizens' Bank v. Carson*, 32 Mo. 191; *Long Island Bank v. Townsend*, Hill & Denio, 204. But see *State Bank v. Armstrong*, 4 Dev. 519, and *State Bank v. Locke*, id. 529.

<sup>2</sup> *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. Rep. 115; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. Rep. 233; *Coney v. Laird*, 153 Mo. 408, 55 S. W. Rep. 96; *Orr v. Nagle*, 87 Hun, 12, 33 N. Y. Supp. 879; *Burt v. Butterworth*, 19 R. I. 127, 32 Atl. Rep. 167; *Perry v. Bozeman*, 67 Ga. 643; *Greer v. Burnam*, 71 id. 31; *Trotter v. Grant*, 2 Wend. 413; *Robbins v. Lincoln*, 12 Wis. 1; *Peters v. Anderson*, 5 Taunt. 596; *Arnold v. Johnson*, 2 Ill. 196; *Brady's Adm'r v. Hill*, 1 Mo. 225; *Brewer v. Knapp*, 1 Pick. 332; *Holmes v. Pratt*, 34 Ga. 558; *Washington Bank v. Prescott*, 20 Pick. 339; *Goddard v. Cox*, 2 Str. 1194; *Allen v. Kimball*, 23 Pick. 473; *Brooke v. Enderby*, 2 B. & B. 70; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Bosanquet v. Wray*, 6 Taunt. 597.

<sup>3</sup> *Stone v. Talbot*, 4 Wis. 442. See *Ayer v. Hawkins*, 19 Vt. 26; *Lee v. Early*, 44 Md. 80; *McLendon v. Frost*, 57 Ga. 448.

<sup>4</sup> *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Cremer v. Higginson*, 1 Mason, 338; *Whetmore v. Murdock*, 3 Woodb. & M. 390. See *Kid-*

*der v. Norris*, 18 N. H. 532; *Wright v. Laing*, 3 B. & C. 165.

<sup>5</sup> *Richardson v. Coddington*, 49 Mich. 1, 12 N. W. Rep. 886; *Lamprell v. Bellericay Union*, 3 Ex. 283; *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Early v. Flannery*, 47 Vt. 253; *Niagara Bank v. Roosevelt*, 9 Cow. 409; *Bohe v. Stickney*, 36 Ala. 482; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Heintz v. Cahn*, 29 Ill. 308; *Bacon v. Brown*, 1 Bibb, 334, 4 Am. Dec. 640; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Cloney v. Richardson*, 34 Mo. 370; *Smith v. Applegate*, 1 Daly, 390. See *Dedham Bank v. Chickering*, 4 Pick. 314; *Gass v. Stinson*, 3 Sumn. 99; *Hunter v. Osterhoudt*, 11 Barb. 33; *Effinger v. Henderson*, 33 Miss. 449.

In *Arnold v. Johnson*, 2 Ill. 196, it is held the creditor may apply the payment to any debt he sees proper, unless there are circumstances which would render the exercise of such discretion on the part of the creditor unreasonable, and enable him to work injustice to his debtor. See *Bridenbecker v. Lowell*, 32 Barb. 9; *Lindsey v. Stevens*, 5 Dana, 107.

<sup>6</sup> *Smith v. Smith*, 105 Ga. 717, 31 S. E. Rep. 754.

principle does not seem to be recognized in Missouri. In a case where a deed of trust secured two notes, with different sureties, the proceeds of the foreclosure sale being sufficient to pay either note, but not both, the creditor was sustained in applying the money so as to retain the benefit of both securities, without regard to the dates when the notes matured.<sup>1</sup> The test as to whether the application made is valid or not, as applied to payments for goods sold, is whether the debtor could recover the money paid, which, as a rule, can only be done where payment has been made in consequence of fraud, or under duress, or under a mistake of fact. This principle does not extend to a case where liquors are sold for the purpose of being resold in violation of law. Hence the application of money paid to the items of an account covering such liquors is valid, though no action would lie to recover their price.<sup>2</sup>

Where part of a debt is barred by the statute and a [407] part is collectible, and the debtor makes a payment, requiring and receiving a receipt in full of all demands, the law will imply an application of the payment to the collectible portion.<sup>3</sup> But where a debtor pays money, without any specific directions, on account of several debts, all of which are barred, the creditor may apply it to either at his option; he may apply it to the largest and thus revive it as to a balance. But he is not at liberty to apply a part of the payment to each of the several demands and thereby revive them all.<sup>4</sup> And it has been held that where a payment made is less than either of several distinct demands, the creditor having a right to apply it is not allowed to divide it and apply a part to each demand,<sup>5</sup> but in a later case, the indebtedness in question consisting of two notes and an account of different dates, the creditor was sustained in applying a general payment in such manner as to keep all the debts alive.<sup>6</sup> This is in accordance with the prevailing doctrine, none of the debts being barred by statute.<sup>7</sup>

<sup>1</sup> *Sturgeon Savings Bank v. Riggs*, 72 Mo. App. 239.

<sup>2</sup> *Mayberry v. Hunt*, 34 N. B. 628.

<sup>3</sup> *Berrian v. Mayor*, 4 Robert. 538. See *Hill v. Robbins*, 22 Mich. 475.

<sup>4</sup> *Ayer v. Hawkins*, 19 Vt. 26. See *contra*, *Jackson v. Burke*, 1 Dill. 311. See *Armistead v. Brooke*, 18 Ark. 521.

<sup>5</sup> *Wheeler v. House*, 27 Vt. 735.

<sup>6</sup> *Rowell v. Estate of Lewis*, 72 Vt. 163, 47 Atl. Rep. 783; *Beck v. Haas*, 111 Mo. 264, 20 S. W. Rep. 19, 33 Am. St. 516.

<sup>7</sup> Where money is paid by a debtor to a creditor who has several demands against him, and no directions are given how he shall apply

The rule of Clayton's Case,<sup>1</sup> which is that, where an account current is kept between parties, as a banking account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account, is not an invariable rule; the circumstances of a case may afford ground for inferring that the transactions of the parties were not intended to come under that rule, as where there is no account current, and no setting off of one item against another, but credit is given for the entire sum paid at the end of all the items. In such a case the creditor may make the application up to the last moment, by action or, otherwise, by intention expressed, implied or presumed.<sup>2</sup>

it, the creditor may apply it as he pleases; therefore, when he holds two bonds of his debtor, both due, and payable with interest, and money is so paid to him, he may apply it to the part extinguishment of both bonds; and he is not bound to apply it on one bond until it be satisfied, and the residue to the other. *Smith v. Screven*, 1 McCord, 368. See *James v. Malone*, 1 Bailey, 334.

In *Washington Bank v. Prescott*, 20 Pick. 339, four notes were made by the same person, and indorsed by the defendant; they were in the hands of the same holder; and the defendant, before any of them became due, gave the holder an order for the payment of the notes without expressing any priority out of property conveyed by the maker to assignees by an indenture to which the indorser was a party, for the payment of the notes in full or proportionably, which property proved to be insufficient. The assignees, in pursuance of the order, made a payment after all the notes had fallen due, and the holder applied the

money to all the notes *pro rata*, instead of applying it wholly to those which had first fallen due, and it was held that he had a right to make such application. In an action on two of the notes, it was held that the other two, with the indorsements thereon, were admissible in evidence in order to explain the appropriation of the money paid on the order. And it was also held that the jury in assessing the damages were not to regard any dividend which might in the future be paid on such order. See *Blackstone Bank v. Hill*, 10 Pick. 129; *Blackman v. Leonard*, 14 La. Ann. 59; *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687.

In order that the partial payment of a debt part of which is barred shall take it all out of the statute of limitations "there must be reasonable evidence that the debtor recognized and admitted the whole of the indebtedness to be due; but if he did so admit, and made a general payment on account of it, there is no reason for applying the admission and payment to either of

<sup>1</sup> 1 Merivale, 585.

<sup>2</sup> *Cory v. Owners of Turkish Steamship Mecca*, [1897] App. Cas. 286.

§ 239. **Same subject.** It has been held that a cred- [408]  
itor may apply money paid by the debtor without directions  
to a debt on which the statute of frauds does not allow an ac-  
tion to be maintained,<sup>1</sup> or on a bill void for want of a stamp,<sup>2</sup>  
or to one of two bills, or one of two debts barred by the  
statute of limitations.<sup>3</sup> The general rule, however, is that the  
creditor cannot make an application of moneys to any demand  
for which he could not sustain an action.<sup>4</sup> He is not permitted  
to apply them to an illegal demand, although a debtor may do  
so.<sup>5</sup> A more precise and accurate statement of the rule in re-  
spect to a creditor's right to apply a payment not appropriated  
by the debtor is that the creditor may apply it on either of  
several demands at his pleasure where they are all equally  
valid, payable absolutely, liquidated, due, and not in fact con-  
tested.<sup>6</sup> A creditor will not be allowed to make such an ap-

the notes rather than to the others, but it would carry out the inten-  
tions of the parties to apply the  
acknowledgment and payment to  
each of the notes, that is, to the  
whole indebtedness." *Taylor v. Fos-*  
*ter*, 132 Mass. 30.

In *Mills v. Fowkes*, 5 Bing. N. C. 455, it is ruled that a creditor may  
apply a general payment to a barred  
debt, though he holds claims which  
are not barred. But see *Reed v.*  
*Hurd*, 7 Wend. 408; *Heath v. Gren-*  
*ell*, 61 Barb. 190; *Harrison v. Day-*  
*ries*, 23 La. Ann. 216.

<sup>1</sup> *Haynes v. Nice*, 100 Mass. 327;  
*Philpott v. Jones*, 4 Nev. & Man. 14,  
2 A. & E. 41; *Rohan v. Hanson*, 11  
Cush. 44; *Ramsay v. Warner*, 97  
Mass. 13.

<sup>2</sup> *Biggs v. Dwight*, 1 M. & Ry. 308.

<sup>3</sup> *Mills v. Fowkes*, 7 Scott, 444, 5  
Bing. N. C. 458; *Hopper v. Hopper*,  
61 S. C. 124, 137, 39 S. E. Rep. 366.  
See last note to § 238.

<sup>4</sup> *Kidder v. Norris*, 18 N. H. 532;  
*Wright v. Laing*, 3 B. & C. 165; *Ban-*  
*croft v. Dumas*, 21 Vt. 456; *Nash v.*  
*Hodgson*, 6 De G., M. & G. 474; *Ku-*  
*ker v. McIntyre*, 43 S. C. 117, 20 S.

E. Rep. 976 (void bond executed by  
a married woman); *Mullooly v. Hua-*  
*tau*, 1 N. Z. L. R. (Sup. Ct.) 151.

<sup>5</sup> *Rohan v. Hanson*, 11 Cush. 44;  
*Greene v. Tyler*, 39 Pa. 361; *Robinson*  
*v. Allison*, 36 Ala. 525; *Gill v. Rice*,  
13 Wis. 549. See *McCarty v. Gor-*  
*don*, 16 Kan. 35; *Fay v. Lovejoy*, 20  
Wis. 407; *Phillips v. Moses*, 65 Me. 70.

In *Clark v. Mershon*, 2 N. J. L. 70,  
it was held where a tavern-keeper  
was indebted to his customer, the  
items of liquor were to be considered  
as payment *pro tanto*, and not a  
*trust* or *credit*, within the tavern act  
of New Jersey.

In *Adams v. Mahnken*, 41 N. J. Eq.  
332, 3 Atl. Rep. 520, it is held that  
creditors who hold a bond contain-  
ing a void usurious agreement and  
other indebtedness unaffected by  
such agreement can only appropri-  
ate payments so far as they might  
have been recovered. *Edwards v.*  
*Rumph*, 48 Ark. 479, 3 S. W. Rep. 635;  
*Dunbar v. Garrity*, 58 N. H. 75.

<sup>6</sup> *Wellman v. Miner*, 179 Ill. 326, 53  
N. E. Rep. 609. See *Stone v. Talbot*,  
4 Wis. 442.

plication of a payment as the debtor might reasonably object to, or as would work injustice to him.<sup>1</sup> He may not, by applying it to a contested claim, throw the burden upon the debtor of disproving the demand.<sup>2</sup> An application by the creditor, contrary to the debtor's directions, but acquiesced in by him, will be binding.<sup>3</sup> It is not necessary that the demands be all of the same grade or dignity; part may be specialties, and part simple contract debts, and the creditor has the choice on which he will apply a general payment.<sup>4</sup> As between a legal and equitable demand, it would seem that preference must be given to the legal; the creditor is not at liberty to pay a later equitable claim instead of an older legal debt;<sup>5</sup> and it is not certain that he has the option to apply the money to a prior equitable demand in preference to a later legal one.<sup>6</sup> He may apply a payment to a demand not secured in lieu of one secured, or to one the security for which is more precarious.<sup>7</sup> Such right is not affected by a clause in a chattel mortgage to the effect that, upon the mortgagor's default, the mortgagee might sell the property and apply the net proceeds to the payment of the debt, returning the overplus to the mortgagor.<sup>8</sup> Payments

<sup>1</sup> *Bonnell v. Wilder*, 67 Ill. 327; *Bridenbecker v. Lowell*, 32 Barb. 9; *Taylor v. Coleman*, 20 Tex. 772; *Lindsey v. Stevens*, 2 Dana, 107; *Arnold v. Johnson*, 2 Ill. 196; *Ayer v. Hawkins*, 19 Vt. 26. See *Bean v. Brown*, 54 N. H. 395; *Gass v. Stinson*, 3 Sumn. 99.

<sup>2</sup> *Stone v. Talbot*, *supra*.

<sup>3</sup> *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Flarsheim v. Brestrup*, 43 Minn. 298, 45 N. W. Rep. 438.

<sup>4</sup> *Meggot v. Wild*, 1 Ld. Raym. 287; *Mayer v. Patten*, 4 Cranch. 317; *Peters v. Anderson*, 5 Taunt. 596; *Hargroves v. Cooke*, 15 Ga. 321; *Pierce v. Knight*, 31 Vt. 701; *Pennypacker v. Umberger*, 22 Pa. 492; *Heintz v. Cahn*, 29 Ill. 308; *Brazier v. Bryant*, 2 Dowl. P. C. 477; *Chitty v. Naish*, *id.* 511.

<sup>5</sup> *Goddard v. Hodges*, 1 Cr. & M. 33.

<sup>6</sup> See *Bosanquet v. Wray*, 6 Taunt.

597; *Birch v. Tebbutt*, 2 Starkie, 74; 2 Pars. on Cont. 631.

<sup>7</sup> *Hargroves v. Cooke*, 15 Ga. 321; *Waterman v. Younger*, 49 Mo. 413; *Jenkins v. Beal*, 70 N. C. 440; *Simmons v. Cates*, 56 Ga. 609; *Driver v. Fortner*, 5 Porter, 9; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. 597, 28 N. W. Rep. 162; *White v. Beem*, 80 Ind. 239; *M. A. Sweeney Co. v. Fry*, 151 Ind. 178, 51 N. E. Rep. 234; *Northern Nat. Bank v. Lewis*, 78 Wis. 475, 47 N. W. Rep. 834; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. Rep. 635; *Risher v. Risher*, 194 Pa. 164, 45 Atl. Rep. 71; *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. 733, 15 S. E. Rep. 968; *Hall v. Johnston*, 6 Tex. Civ. App. 110, 24 S. W. Rep. 861.

<sup>8</sup> *Baum v. Trantham*, 42 S. C. 104, 19 S. E. Rep. 973, 46 Am. St. 697.



made on a continuous account of several items, the whole constituting but one debt, will be applied to the items in the order of their date. The rule is not affected because some of the items are subject to a mechanic's lien.<sup>1</sup>

The particular circumstances may give the creditor a right to infer the consent of the debtor to an application not otherwise admissible. He may apply an unappropriated payment to a contingent liability, to a debt not due, to one barred by the statute of limitations, or even to an illegal demand if he has no other. The payment of money under such circumstances necessarily implies a consent to apply it to the demands actually existing.<sup>2</sup> If the debtor agrees that his creditor may apply payments to any indebtedness due when they are made, they may be applied to the satisfaction of an account due instead of a matured note.<sup>3</sup>

Some distinctions have been made in respect to the creditor's right of application between debts which the debtor paying owes separately and alone, and those which he owes jointly with others; and also between debts owing to the person receiving the payment alone, and those to which he and others are jointly entitled. It has been held that if one member of a firm makes a payment to a person who has an account against him, and also against the firm of which he is a member, [410] the creditor must apply the money to the individual account unless he can show a consent to have it otherwise applied.<sup>4</sup> The law will appropriate it to the individual debt in the absence of any application by the parties, if the money paid is not shown to have been derived from the fund from which the joint liability was to be met.<sup>5</sup> This strict rule has not been

<sup>1</sup> Pond & Hasey Co. v. O'Connor, 70 Minn. 266, 73 N. W. Rep. 248.

<sup>2</sup> Hall v. Clement, 41 N. H. 166; Bowe v. Gano, 9 Hun, 6; Treadwell v. Moore, 34 Me. 112; Ayer v. Hawkins, 19 Vt. 26. See Rackley v. Pearce, 1 Ga. 241; Bancroft v. Dumas, 21 Vt. 456; § 238; Arnold v. Prole, 4 M. & G. 860.

<sup>3</sup> Everton v. Day, 66 Ark. 73, 48 S. W. Rep. 900.

<sup>4</sup> Johnson v. Boone, 2 Harr. 172;

Gass v. Stinson, 3 Sumn. 98; Sneed v. Wiester, 2 A. K. Marsh. 277.

<sup>5</sup> Baker v. Stackpoole, 9 Cow. 420, 18 Am. Dec. 508; Camp v. Smith, 136 N. Y. 187, 32 N. E. Rep. 640; Livermore v. Claridge, 33 Me. 428. See Lee v. Fountaine, 10 Ala. 755, 44 Am. Dec. 505.

After the dissolution of a partnership one of its members continued the business, agreeing to pay all the partnership debts and taking enough

uniformly recognized. The creditor has been given the choice, in the absence of directions, to apply it upon the joint debt.<sup>1</sup> Payments made by a surviving partner, while carrying on the partnership business for the joint benefit of himself and the estate of the deceased partner, pursuant to a stipulation in the partnership articles, upon an account, some items of which were contracted before and some after the death of the other partner, must be applied to the discharge of the first items.<sup>2</sup> Where the debtor making a general payment owes a debt to a firm, and also one to the member of it to whom the payment is personally made, the receiver is precluded by his relation of agent for the firm from preferring his own claim. It is implied in the very nature of an agent's or trustee's contract that he will take the same care, at least, of the property intrusted to him that he does of his own.<sup>3</sup> Therefore, he should apply the payment *pro rata* to both debts.<sup>4</sup> If the debtor is a firm the creditor cannot apply moneys paid by it to the individual debts of one or more of the partners.<sup>5</sup>

[411] § 240. Same subject. A creditor cannot apply a payment made generally on account of existing debts to a new

of the firm property to do so; he added other goods to the stock and mortgaged it to secure both the joint and individual debts. It was held that a creditor might apply payments made to the latter debt. *King v. Sutton*, 42 Kan. 600, 23 Pac. Rep. 695; *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea, 695.

<sup>1</sup> *Van Rensselaer v. Roberts*, 5 Denio, 470; *Boyd v. Webster*, 59 N. H. 89.

<sup>2</sup> *Stanwood v. Owen*, 14 Gray, 195; *Morgan v. Tarbell*, 28 Vt. 498.

In *Fairchild v. Hoolly*, 10 Conn. 475, an account against a partnership, upon which sundry payments had been made, was entire and unbalanced; before any payments had been made a secret partner had withdrawn from the concern, and the payments were made by one of the partners who remained. Held, that

the money with which payment was made could not be presumed to have accrued out of the funds of the new firm, and to be applied, therefore, to the benefit of the fund from which it had been taken; that it could not be applied to the portion of the account accruing after the withdrawal, on the principle that it should be applied to the debt for which there was the least security, because it did not appear but that the company was as solvent after the withdrawal as before; but that the money so paid should be applied to the oldest items of the account.

<sup>3</sup> *Colby v. Copp*, 35 N. H. 434.

<sup>4</sup> *Id.*; *Favenc v. Bennett*, 11 East, 36; *Barrett v. Lewis*, 2 Pick. 123; *Scott v. Ray*, 18 id. 360; *Cole v. Trull*, 9 id. 325.

<sup>5</sup> *Farris v. Morrison*, 66 Ark. 318, 50 S. W. Rep. 693.

debt subsequently contracted;<sup>1</sup> nor to an instalment of the same debt becoming due subsequent to the payment.<sup>2</sup> It has been held that the creditor's application is not complete and absolute until the debtor has been notified of it.<sup>3</sup> When such notice has been given the money is appropriated.<sup>4</sup> An objection to the application made by the debtor ten days after he has been informed of it is too late.<sup>5</sup>

If the holder for collection of several notes against one debtor, which are owned by various persons, receives from him a sum less than the amount of all the notes, and the debtor makes no application of the payment, it is competent for the creditors owning the notes to direct the application to any of them. In an action after such payment upon one of such notes, in the absence of any application up to the time of the trial, no part will be applied to the note in suit if it appears that the plaintiff has not received part of the money.<sup>6</sup> An attorney holding several notes for collection, belonging to different persons, and receiving a payment on account of them not appropriated by the debtor, may himself appropriate it.<sup>7</sup> But if an agent, having a demand himself against the debtor, and also acting for a principal who has a demand against the same debtor, receives an unappropriated payment from such debtor, he must apply it ratably to both.<sup>8</sup>

<sup>1</sup> *Miles v. Ogden*, 54 Wis. 573, 12 N. W. Rep. 81; *Law's Ex'r v. Sutherland*, 5 Gratt. 357; *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508.

A. owed a debt to B. payable on demand, for which C. was surety. A. assigned debts of others to B. as a means of payment in part. After such assignment, but before the assigned debts were collected, A. contracted another debt to B. for which there was no security. Held, that B. could not, after collection of the assigned debts, apply the same to pay the debt contracted after the assignment, and recover the first debt from C., the surety for it. *Donally v. Wilson*, 5 Leigh, 329.

<sup>2</sup> *Gates v. Burkett*, 44 Ark. 90; *Heard v. Pulaski*, 80 Ala. 502, 2 So. Rep. 343; *Kline v. Ragland*, 47 Ark.

111, 14 S. W. Rep. 474; *Seymour v. Sexton*, 10 Watts, 255.

<sup>3</sup> *Ryan v. O'Neil*, 49 Mich. 281, 13 N. W. Rep. 591; *Lane v. Jones*, 79 Ala. 156; *Simson v. Ingham*, 2 B. & C. 65; *Allen v. Culver*, 3 Denio. 284; *Van Rensselaer v. Roberts*, 5 id. 470.

<sup>4</sup> *Id.*; *The Asiatic Prince*, 47 C. C. A. 325, 108 Fed. Rep. 287; *Bopp v. Wittich*, 88 Mo. App. 129.

<sup>5</sup> *Risher v. Risher*, 194 Pa. 164, 45 Atl. Rep. 71.

In North Carolina no change of the application can be made after the creditor has given the debtor credit by entering it. *Burnett v. Sledge*, 129 N. C. 114, 39 S. E. Rep. 775.

<sup>6</sup> *Taylor v. Jones*, 1 Ind. 17.

<sup>7</sup> *Carpenter v. Goin*, 19 N. H. 479.

<sup>8</sup> *Barrett v. Lewis*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325.

The right of appropriation is confined to the parties; no third person can insist on any application which neither of them has made.<sup>1</sup> Thus the grantee of a mortgagor cannot [412] insist that money of the mortgagor in the mortgagee's hands shall be 'used to' pay off the mortgage unless this was clearly contemplated by the parties, and the grantee made his purchase upon that understanding.<sup>2</sup> Strangers can demand nothing in this regard which the parties have not required.<sup>3</sup> Where creditors claim equities through their debtors they are usually estopped by what the debtors do; but fraud never estops creditors. This doctrine relative to the application of payments applies only where the creditor has two or more honest claims against the debtor; it does not apply so as to conclude creditors where there is only one such. Therefore a subsequent mortgagee may object to the application by the holder of an earlier mortgage of partial payments to usurious interest for the purpose of keeping alive that part which is valid.<sup>4</sup> As has been already stated, a surety of a debtor who makes an indefinite payment cannot interfere with the election of the creditor; nor will an intention of the debtor be presumed to apply it in favor of the surety so as to exclude the right of the creditor to make the application.<sup>5</sup> But where,

<sup>1</sup> *Harding v. Tift*, 75 N. Y. 461; *Feldman v. Beier*, 78 id. 393; *Coles v. Withers*, 33 Gratt. 186; *Mack v. Adler*, 22 Fed. Rep. 570; *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. Rep. 74; *Thorn & Hunkins' Lime & Cement Co. v. Citizens' Bank*, 158 Mo. 272, 59 S. W. Rep. 109.

<sup>2</sup> *Gordon v. Hobart*, 2 Story, 243; *Backhouse v. Patton*, 5 Pet. 160.

<sup>3</sup> *Spring Garden Ass'n v. Tradesmen's Loan Ass'n*, 46 Pa. 493. See *Parker v. Green*, 8 Met. 137.

<sup>4</sup> *Greene v. Tyler*, 39 Pa. 361. See *Chester v. Wheelwright*, 15 Conn. 562.

<sup>5</sup> *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357; *Wilson v. Allen*, 11 Ore. 154, 2 Pac. Rep. 91.

Payments made generally to the creditors on account of a person for whom a guaranty is given may be

applied by them in liquidation of a balance existing against him before it was given, and the guarantor cannot insist on the payments being applied in exoneration of his liability, although at the time of his assuming it the creditors did not give him notice that any such balance was then existing. *Kirby v. Marlborough*, 2 M. & S. 18. See *Merrimack Co. v. Brown*, 12 N. H. 320.

It is held in *Gore v. Townsend*, 105 N. C. 228, 11 S. E. Rep. 160, 8 L. R. A. 443, that a mortgagee who holds two mortgages, the older of which was executed by a husband and his wife to secure the former's debt, and the latter of which was executed by him alone on the same property to secure a subsequent note, cannot appropriate the proceeds of personal property to the payment of

at the inception of the contract of suretyship, a mode of payment was agreed upon and a particular fund identified for that purpose, the surety may insist on the application of that fund when it is realized. Thus, a factor who has accepted a bill drawn by his principal, as against an accommodation drawer who becomes such on the faith of a consignment of cotton made to meet it at maturity, cannot apply the proceeds of the consignment to another debt, and no factor's lien for such other debt will be permitted to intervene.<sup>1</sup> When the party having a right to appropriate a payment has done so, [413] the appropriation is final, and he cannot change it.<sup>2</sup>

§ 241. **Appropriation by the court.** Where the parties have not made a specific appropriation of moneys paid, and there are several debts or demands for which the party paying the money is liable to the party receiving it, the fundamental rule or principle is that the law will appropriate it according to the justice and equity of the case.<sup>3</sup> It has been said that in

the second mortgage; it must go to the payment of the first in exoneration of the wife's dower right, she being a surety for her husband.

<sup>1</sup> *Brander v. Phillips*, 16 Pet. 131. See *Marryatts v. White*, 2 Stark. 101, in which security having been given by a surety for goods to be supplied and in respect of a pre-existing debt, the goods were supplied, and payments made from time to time by the principal, in respect of some of which discount was allowed for prompt payment; held, that it must be inferred in favor of the surety that all these payments were intended to be in liquidation of the latter account; also *Shaw v. Picton*, 7 D. & R. 201, 4 B. & C. 715, where the same agent had a bill of account with the grantor of several annuities, for the payment of which A. became surety, and in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities from the grantor and his surety, a

sum of money was paid under circumstances from which it was to be collected that the money was intended to be specifically appropriated to the annuity account, and the agents applied it to the bill account; held, that this was a misapplication, and that the money ought to be appropriated *pro rata* among the annuitants in relief of the surety.

<sup>2</sup> *Wright v. Wright*, 72 N. Y. 149.

<sup>3</sup> *Martin v. Ede*, 103 Cal. 157, 37 Pac. Rep. 199; *McCartney v. Buck*, 8 Houst. 34, 12 Atl. Rep. 717; *Field v. Holland*, 6 Cranch, 8; *Souder v. Schechterly*, 91 Pa. 83; *Spiller v. Creditors*, 16 La. Ann. 292; *Stone v. Seymour*, 15 Wend. 19; *Parker v. Green*, 8 Met. 144; *Norris v. Beaty*, 6 W. Va. 477; *Robinson v. Doolittle*, 12 Vt. 246; *Randall v. Parramore*, 1 Fla. 409; *Chester v. Wheelwright*, 15 Conn. 562; *Calvert v. Carter*, 18 Md. 73; *Neidig v. Whiteford*, 29 Md. 178; *Haden v. Phillips*, 21 La. Ann. 517; *Upham v. Lefavour*, 11 Met. 174; *Seymour v. Van Slyck*, 8 Wend. 403; *Hargroves v. Cooke*, 15 Ga. 321; *Leef*

law that application is made which is most favorable to the creditor; in equity, the payment is applied first to the debt for which the security is most precarious.<sup>1</sup> In applying the cardinal principle various subsidiary rules have been recognized, in respect to which and in the reasons assigned therefor the decisions are not entirely in accord. Many cases proceed upon the assumption that the intention of one or both of the parties is to be effectuated, or that the interest of one party in preference to that of the other is entitled to be subserved.<sup>2</sup>

v. Goodwin, Taney, 460; Callahan v. Boazman, 21 Ala. 246; Bayley v. Wynkoop, 10 Ill. 449; Benny v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293; Proctor v. Marshall, 18 Tex. 63; Oliver v. Phelps, 20 N. J. L. 180; McFarland v. Lewis, 3 Ill. 344; White v. Trumbull, 15 N. J. L. 314, 29 Am. Dec. 687; Carson v. Hill, 1 McMull. (S. C.) 76; Selleck v. Sugar Hollow Turnpike Co., 13 Conn. 453; Rosseau v. Cull, 14 Vt. 83; Starrett v. Barber, 20 Me. 457.

<sup>1</sup> Chicago Title & Trust Co. v. McGlew, 90 Ill. App. 58.

<sup>2</sup> Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. Rep. 160; McDaniel v. Barnes, 5 Bush, 183; Allen v. Culver, 3 Denio, 284; Byrne v. Grayson, 15 La. Ann. 457; Spiller v. Creditors, 16 id. 292; Calvert v. Carter, 18 Md. 73; Pierce v. Sweet, 33 Pa. 151; Poindexter v. La Roche, 7 Sm. & M. 699; Bussey v. Gant's Adm'r, 10 Humph. 238; Pattison v. Hull, 9 Cow. 747; Dows v. Morewood, 10 Barb. 183; Johnson's Appeal, 37 Pa. 268; Seymour v. Sexton, 10 Watts, 255.

In Johnson's Appeal, *supra*, Strong, J., said: "The fact of actual appropriation to the earliest items of the account not being established, the next question is whether the law requires that the credits should be thus applied. In the absence of direction by the debtor, and of actual application by the creditor, the law will make an equitable application, and in making it will regard the circum-

stances of the case. In the present case it should make no difference to Duncan whether his credits were applied to the earlier or to the later items of the account. 'He was equally a debtor for both and both carried interest. It is true that when payments are made upon a running account it is one of the principles of legal application that they shall be treated as extinguishing the earliest charges in the account. But this is not a paramount principle. Another of equal force is that the payments are to be applied to that debt which is least secured. Both these rules look to the interest of the creditor, it being presumed that the debtor by neglecting to give any direction consented to such an application as would be most beneficial to the creditor. But to apply Duncan's credits to the first items of the account . . . against him and thus extinguish the mortgage in the first instance would be an application not beneficial to the debtor, and most hurtful to the creditor. It would be paying first the debt which was best secured, and leaving the later advances without the protection of a factor's lien and without any security at all as against judgments entered before they were made. It would be reversing the fundamental rule of appropriations.' The equitable circumstances stated abundantly justify the application which was made with-

But it is believed that there is no presumption of intention which controls where the law makes the application.<sup>1</sup> If there is evidence of intention, it governs, of course,<sup>2</sup> but the application then is not made by the law, but by the party whose intention controls. And when the interest of one party is subserved it is not upon any invidious preference, but upon some special ground of equity which appeals to the conscience of the court in his behalf.<sup>3</sup> Such considerations sometimes re-

out the presumption that "the debtor by neglecting to give any direction consented to such an application as would be most beneficial to the creditor." There would seem to be no more ground for such a presumption than that the creditor by neglecting to make an actual application of the credits consented to such an application as would be most beneficial to the debtor.

That there is no such presumption that the debtor consents to an application most beneficial to the creditor is evident from the cases that consult the interest of the debtor where there are no countervailing equities. Thus, in accordance with the general course of authority, the law applies a payment to a debt bearing interest in preference to one not bearing interest. *Seymour v. Sexton*, *supra*. *Crompton v. Prall*, 105 Mass. 255, proceeds on the same principle. *Dows v. Morehead*, 10 Barb. 183, holds that the law will apply payments to that debt, a relief from which will be most beneficial to the debtor; as, for example, acceptances for which an instrument in the shape of a mortgage or pledge of personal property is given. *Poin-dexter v. La Roche*, 7 Sin. & M. 699, and *Pattison v. Hull*, 9 Cow. 747, are to the same effect. But a more satisfactory statement of the principle is to be found in *Field v. Holland*, 6 Cranch, 8, where Marshall, C. J., says: "When a debtor fails to avail himself of the power he possesses,

in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." See *Langdon v. Bowen*, 46 Vt. 512; *Truscott v. King*, 6 N. Y. 147; *Worthley v. Emerson*, 116 Mass. 374; *The A. R. Dunlap*, 1 Low. 350; *Robie v. Briggs*, 59 Vt. 443, 59 Am. Rep. 737.

In the last case the debtor owed an individual and joint account; his payments amounted to more than the former; in ignorance of the exact state of the account the creditor entered the whole sum paid to the credit of the individual account. The court applied the surplus to the other.

<sup>1</sup> *Moore v. Gray*, 22 La. Ann. 289.

<sup>2</sup> *McMillan v. Grayston*, 83 Mo. App. 425.

If the debtor pays with one intent and the creditor receives with another the former's intent will be given effect. *Roakes v. Bailey*, 55 Vt. 542.

<sup>3</sup> *Pierce v. Knight*, 31 Vt. 701; *Smith v. Loyd*, 11 Leigh, 512, 37 Am. Dec. 621; 2 Greenlf. Ev., § 533.

quire a *pro rata* distribution of the payment to all of several debts; sometimes its appropriation to one for being the oldest, or least secured, to relieve the debtor from some special hazard or hardship, or to absolve a surety.

Where a bank is protected against loss on future overdrafts by a principal his sureties are entitled to have payments made applied to the account which they have guaranteed.<sup>1</sup> If the money paid arises from some property or fund it will be applied to the discharge or reduction of the demand against the same.<sup>2</sup> If several chattels are bought at the same time under a single contract, the promise to pay being single, the court will not apply payments made on the contract to the different articles in the order in which they are specified therein; but will apply them to the contract generally.<sup>3</sup> Partial payments made on a note infected with usury will be applied to the extinguishment of lawful interest, and then to the principal.<sup>4</sup> If an incumbrance is void in part only, payments will be applied first to the discharge of so much as is valid.<sup>5</sup>

**§ 242. When payments applied *pro rata*.** If an indefinite payment is made where there are several debts of the same nature and all things equal, it is applied proportionally.<sup>6</sup> Moneys collected by judicial proceedings founded on several claims cannot be applied by either party; the law will apply them *pro rata*. Thus, where a creditor having several demands against his debtor recovers a portion of the entire amount in a judicial proceeding founded on them all, the law [416] will apply such a recovery as a payment ratably upon them all; neither the debtor nor the creditor has the right to apply it to the satisfaction of some of them in exclusion of others.<sup>7</sup>

<sup>1</sup> Drake v. Sherman, 179 Ill. 362, 53 N. E. Rep. 628.

<sup>2</sup> Brinckerhoff v. Greenan, 85 Ill. App. 253.

<sup>3</sup> Hill v. McLaughlin, 158 Mass. 307, 33 N. E. Rep. 514.

<sup>4</sup> Haskins v. Bank, 100 Ga. 216, 27 S. E. Rep. 985. See §§ 378, 379.

<sup>5</sup> Wingate v. Peoples' Building & Loan Savings Ass'n, 15 Tex. Civ. App. 416, 39 S. W. Rep. 999.

<sup>6</sup> Spiller v. Creditors, 16 La. Ann.

292; Jones v. Kilgore, 2 Rich. Eq. 63; Baine v. Williams, 10 Sm. & M. 113; Pointer v. Smith, 7 Heisk. 137.

Matured notes given for the same consideration and in the hands of a single person constitute but one debt; and payments made after their maturity are applicable to them all. Egle v. Roman Catholic Church, 36 La. Ann. 310.

<sup>7</sup> Olds Wagon Works v. Bank of Louisville, 10 Ky. L. Rep. 253; Orleans



If an insolvent debtor assigns for the benefit of those creditors who become parties to the assignment and thereby release their claims, and a dividend is received by one of them, it must be appropriated ratably to all his claims against the debtor, as well to those upon which other parties are liable, or which are otherwise secured, as to those which are not secured.<sup>1</sup> A general payment made by the principal debtor, pursuant to a compromise of several debts in one lump, will be applied *pro rata* to all the claims against him, in an action against an indorser for part.<sup>2</sup> And doubtless the same rule of application would be applied between the debtor and creditor where there has been a general judgment pursuant to a compromise founded upon and embracing several demands.<sup>3</sup>

A *pro rata* distribution of a payment is made on the equitable maxim that equality is equity. Other considerations may concur and lead to the same result. If a debtor creates a trust or security for the payment of several demands, without preference, money realized from that source is deemed appropriated by him to the demands so provided for, and to be proportionately distributed thereto; and either party may insist on such application.<sup>4</sup> If a general payment is made to a person having two accounts against the party paying, one due to himself and the other to a third party, for whom he was acting as agent, and no appropriation is made by either, it will be applied ratably to both accounts.<sup>5</sup> So where a debt is [417] payable by instalments, or a mortgage is made to secure a

County Nat. Bank v. Moore, 112 N. Y. 543, 8 Am. St. 775, 20 N. E. Rep. 357, 3 L. R. A. 302; Bostick v. Jacobs, 133 Ala. 344, 32 So. Rep. 136; Standifer v. Codington, 35 La. Ann. 896; Cowperthwaite v. Sheffield, 1 Sandf. 416, 3 N. Y. 243; Bridenbecker v. Lowell, 32 Barb. 9. See Thompson v. Hudson, L. R. 6 Ch. 320; Merri-mack County Bank v. Brown, 12 N. H. 320.

Where a fund is insufficient to satisfy several judgments entered the same day, they should be paid *pro rata*, though one was entered a few hours later than the others.

Tucker v. Brackett, 25 Tex. (Supp.) 199; Ordinary v. McCollum, 3 Strobb. 494; Van Aken v. Gleason, 34 Mich. 477; Stamps v. Brown, Walker (Miss.), 526. See Mahone v. Williams, 39 Ala. 202; Jones v. Kilgore, 2 Rich. Eq. 63; Baine v. Williams, 10 Sm. & M. 113.

<sup>1</sup> Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322.

<sup>2</sup> Butchers' and Drovers' Bank v. Brown, 1 N. Y. Leg. Obs. 149.

<sup>3</sup> Thompson v. Hudson, L. R. 6 Ch. 320.

<sup>4</sup> Id.

<sup>5</sup> Wendt v. Ross, 33 Cal. 650.

series of notes payable at different times, and a payment is made after all the instalments or notes have become due, and neither party makes any special appropriation of it, according to the weight of authority it will be applied by the court *pro rata* to all the instalments or notes — and this whether they are held by the original creditor or a part have been transferred, unless the assignee has specially acquired a preference by the agreement of transfer.<sup>1</sup>

When a debt is payable in instalments, and there are separate notes or other distinct evidences of debt payable at different times, all equally payable with or without interest, and a general payment made is not appropriated by either party, if it exceeds the interest and principal due at the time it was made it will be applied, of course, first to pay what is due of interest and principal, and the residue ratably on all and each of the instalments subsequently payable, with accrued interest on the part thus extinguished.<sup>2</sup>

<sup>1</sup> *Cage v. Iler*, 5 Sm. & M. 410, 43 Am. Dec. 521; *Wooten v. Buchanan*, 49 Miss. 336; *Donley v. Hays*, 17 S. & R. 400; *Cooper v. Ulmann*, Walk. Ch. 251; *Mohlen's Appeal*, 5 Pa. 418, 47 Am. Dec. 413; *Henderson v. Herrod*, 10 Sm. & M. 631; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 id. 445; *Youmans v. Heartt*, 34 id. 397; *Betz v. Heebner*, 1 P. & W. 280; *Smith v. Nettles*, 9 La. Ann. 455; *Bailey v. Bergen*, 2 Hun, 520; *Parker v. Mercer*, 6 How. (Miss.) 323; *Cremer v. Higginson*, 1 Mason, 323; *Perrie v. Roberts*, 2 Ch. Cas. 84. But see *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486; *Murdock v. Ford*, 17 Ind. 52; *Stanley v. Beatty*, 4 Ind. 134; *Cullum v. Erwin*, 4 Ala. 452; *Bank of United States v. Covert*, 13 Ohio, 240; *Turner v. Pierce*, 31 Wis. 342.

<sup>2</sup> In *Righter v. Stall*, 3 Sandf. Ch. 608, a debtor owed a mortgage debt, payable in ten annual instalments. About two-thirds of the debt was paid at a time when a small amount was due for interest, and before any

part of the principal had fallen due. There was no direction given by the debtor, nor actual application of the payment made by the creditor; and it was held that the law must make the application, and that after discharging the interest due the balance must be applied ratably in exoneration of each and all of the instalments.

In *Jencks v. Alexander*, 11 Paige, 619, the following rules are laid down: 1. Where the principal is not due, but the interest is due, the payment must first be applied to pay the interest then due; and the residue towards that part of the principal which will first become due and payable, so as to stop the interest, *pro tanto*, from the time of such payment. 2. When neither principal nor interest has become due at the time of the payment, the amount paid should be applied to the extinguishment of principal and interest ratably; so as to extinguish a part of the principal and the interest which has accrued on the part of

§ 243. General payment applied to oldest debt. If [418] no other paramount rule of appropriation governs, an indefinite payment made to a person to whom a debtor paying the money owes several debts will be applied to that which [419]

the principal thus extinguished. The facts of the case were that August 24, 1833, a mortgage was given for \$650, payable in five equal yearly payments, the first to become due on the first of January following, with interest annually. Five hundred dollars were paid and indorsed on the day the mortgage was given. On the 14th of the following September a further sum of \$3 was paid. On the 4th of November, 1835, proceedings to foreclose were commenced on a claim of \$20.98 of delinquent interest, and it was held that \$20.58 was then due. The chancellor said: "I think the counsel for the complainants is wrong in supposing that nothing had become due and payable upon the mortgage at the time the proceedings to foreclose were instituted. It is true a sum much larger than the two instalments of \$130 each, and all interest upon the residue, had been paid. But the proper application of the payments was to apply them towards the satisfaction of the principal of the debt at the time of such payments respectively, after deducting from such payments the interest which had then accrued. The payment of the \$500 on the day of the date of the mortgage, being applied in satisfaction of the three first instalments of principal and \$110 of the fourth instalment, left \$20 of the fourth and the whole of the fifth instalments still due. And as by the terms of the bond and mortgage the interest on the whole \$650 was payable annually, the mortgagee would have been entitled to the annual interest on the \$150 which still re-

mained due on the last two instalments, if there had been no subsequent payment. The payment of \$3 on the 14th of September, 1833, must be applied towards the fourth instalment of principal, after deducting therefrom the interest on the \$3 from the 24th of the preceding August. In other words, when the principal is not due, but interest is due (a different case), the payment must first be applied to the extinguishment of the interest then due and payable, and the residue to the extinguishment of that part of the principal which will first become due, so as to stop interest, *pro tanto*, from the time of such payment. But when neither principal nor interest has become due (the case in hand) at the time of the payment, such payment, in the absence of any agreement as to the application, is to be applied to the extinguishment of principal and interest ratably, according to the decision of the supreme court in the case of *Williams v. Houghtaling*, 3 Cow. 86."

In *Williams v. Houghtaling* the court say: "When, according to the terms of the bond payable by instalments, interest cannot be demanded until the principal is payable (as in this case), payments made on an instalment not due and payable should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished. For instance, an instalment on a bond of \$500 is due on the 1st of January, 1825, with interest from 1st of January, 1824; on the first of July, 1824, the obligor pays \$207; the \$7 should be applied to pay

first accrued.<sup>1</sup> This rule is especially applicable to items of [420] debit and credit in a general account current.<sup>2</sup> When both parties concur in the entry of the payments upon general account, without specific application, the law infers an inten-

the six months' interest accrued on \$200, and the \$200 extinguishes so much principal."

There is *dictum* in *Jencks v. Alexander* apparently in conflict with the text and in conflict with *Righter v. Stall*. The conclusion arrived at is not in conflict. If the payment of \$500 had been ratably applied to the five instalments, they would have been severally reduced to \$30, and interest on each annually payable would be the same, and due at the same time, as upon a like amount on the two past instalments. When the payment of \$3 was made no interest or principal was due. It being paid on the mortgage generally was applicable ratably towards paying the entire principal and interest.

In *Turner v. Pierce*, 31 Wis. 342, there was a land contract made October 22, 1863, upon which the purchase-money was \$5,600, due in six annual instalments, payable August 1, 1865, to 1870, with interest on the whole sum unpaid, payable at the time each instalment became due—the purchaser having the option to make the payments on or before the times mentioned, and then to pay interest only to the time of such payment. Before any of the principal became due the purchaser made a large payment, receipted to apply on the land contract. On the 5th of March, 1866, an action for strict foreclosure of the contract was begun on the ground that the purchaser was in default. The title had

failed to a part of the lands, and the court held that each instalment should be reduced in the proportion that the value of that part (\$1,832) bore to the whole value, and that the defendant was entitled to have the payment applied to the instalments first becoming due at such decreased rates, and that therefore nothing was due when the suit was commenced. See *Starr v. Richmond*, 30 Ill. 276.

<sup>1</sup> *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. Rep. 768; *Atkins v. Atkins*, 71 Vt. 422, 41 Atl. Rep. 503; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 21 N. E. Rep. 57; *Northwestern Lumber Co. v. American Exp. Co.*, 73 Wis. 656, 41 N. W. Rep. 1059; *The Mary K. Campbell*, 40 Fed. Rep. 906; *Sanford v. Van Arsdall*, 53 Hun, 70, 6 N. Y. Supp. 494; *Duncan v. Thomas*, 81 Cal. 56, 22 Pac. Rep. 297; *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. Rep. 74; *Moses v. Noble*, 86 Ala. 407, 5 So. Rep. 181; *Ashby v. Washburn*, 23 Neb. 571, 37 N. W. Rep. 267; *Marks v. Robinson*, 82 Ala. 69, 2 So. Rep. 292; *State v. Chadwick*, 10 Ore. 423; *Mackey v. Fullerton*, 7 Colo. 556, 4 Pac. Rep. 1198; *Bennett v. McGillan*, 28 Fed. Rep. 411; *McGillin v. Bennett*, 132 U. S. 445, 10 Sup. Ct. Rep. 122; *Pardee v. Markle*, 111 Pa. 548, 56 Am. Rep. 299; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. Rep. 474; *Brown v. Shirk*, 75 Ind. 266; *McCurdy v. Middleton*, 82 Ala. 131, 2 So. Rep. 721; *Hammett v. Dudley*, 62

<sup>2</sup> *Carey-Lombard Lumber Co. v. Hunt*, 54 Ill. App. 314; *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N. W. Rep. 36; *Goetz v. Piel*, 26

*Mo. App.* 634; *Swett v. Boyce*, 134 Mass. 381; *Crompton v. Pratt*, 105 id. 255.

tion on the part of both that they shall satisfy the charges therein in the order of their entry; and they will be so applied unless some controlling equity requires a different disposition.<sup>1</sup>

It has been held that this rule should apply without reference to the fact that one item may be better secured than another, since the particular parts, being blended together in one common account, have no separate existence; the balance only is considered as due;<sup>2</sup> and a payment made on such ac-

Md. 154; Hersey v. Bennett, 28 Minn. 86, 41 Am. Rep. 281, 9 N. W. Rep. 590; Helm v. Commonwealth, 79 Ky. 67; Bancroft v. Holton, 59 N. H. 141; Frost v. Mixsell, 38 N. J. Eq. 586; Wagner's Appeal, 103 Pa. 185; Wiesenfeld v. Byrd, 17 S. C. 106; Miliken v. Tufts, 31 Me. 497; Fairchild v. Holly, 10 Conn. 475; Smith v. Loyd, 11 Leigh, 512, 37 Am. Dec. 621; Robinson's Adm'r v. Allison, 36 Ala. 526; Howard v. McCall, 21 Gratt. 205; Wendt v. Ross, 33 Cal. 650; Seymour v. Sexton, 10 Watts, 255; Shedd v. Wilson, 27 Vt. 478; St. Albans v. Failey, 46 Vt. 448; Langdon v. Bowen, 46 Vt. 512; Upham v. Le-favour, 11 Met. 174; Dows v. Morewood, 10 Barb. 183; Allen v. Culver, 3 Denio, 284; Webb v. Dickinson, 11 Wend. 62; Hollister v. Davis, 54 Pa. 508; Allen v. Brown, 39 Iowa, 330; Livermore v. Rand, 26 N. H. 85; Parks v. Ingram, 23 N. H. 283; Thompson v. Phelan, 22 N. H. 339; Bacon v. Brown, 1 Bibb, 334, 4 Am. Dec. 640; Sprague v. Hazenwinkle, 53 Ill. 419; Clayton's Case, 1 Meriv. 585; United States v. Kirkpatrick, 9 Wheat. 720; Berrian v. Mayor, 4 Robert. 538; Horne v. Planters' Bank, 32 Ga. 1; Mills v. Fowkes, 5 Bing. N. C. 455; Pennell v. Deffell, 4 De G., McN. & G. 372; Harrison v. Johnston, 27 Ala. 445; Postmaster-General v. Furber, 4 Mason, 333; Hansen v. Rounsavell, 74 Ill. 238; Souder v. Schechterly, 91 Pa. 83; Perry v.

Booth, 67 App. Div. 235, 73 N. Y. Supp. 216; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 35, 20 N. E. Rep. 632. See Killorin v. Bacon, 57 Ga. 497.

In the case of mutual accounts the credits on one side are applied to the extinguishment of the debts on the other as payments intention-ally made thereon, and not as the set-off of one independent debt against another. Sanford v. Clark, 29 Conn. 457.

As to the application of this rule between *cestuis que trust*, see Wood v. Stenning, [1895] 2 Ch. 433; Mutton v. Peat, [1899] 2 Ch. 556.

<sup>1</sup> Id.; Jones v. United States, 7 How. 681; Sanford v. Clark, 29 Conn. 457; Souder v. Schechterly, 91 Pa. 83; Lodge v. Ainscow, 1 Pennewill, 327, 41 Atl. Rep. 187; Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. Rep. 160; Grasser & Brand Brewing Co. v. Rogers, 112 Mich. 112, 70 N. W. Rep. 443.

If a trustee pays trust money on his account at his banker's and mixes it with his own funds and draws checks against it in the usual manner for his personal use he will be presumed to have drawn his own and not the trust money. Knatchbull v. Hallett, 13 Ch. Div. 696, overruling earlier cases.

<sup>2</sup> Harrison v. Johnston, 27 Ala. 445.

count, without a more specific appropriation, is treated by a majority of the cases as applied to the earliest items, although for some of these the creditor has a lien or other security and has none for the others.<sup>1</sup> Where there is a single open account and a general payment is made by the debtor at full age, it is presumed to be in satisfaction of the earliest items although they accrued during his minority.<sup>2</sup> Such a payment will not be judicially disturbed.<sup>3</sup> The rule concerning the application of payments to the oldest item of the account applies to an open running account with a firm continued unchanged with a member of it who buys the interest of his copartner and continues the business.<sup>4</sup> As between a debt due and a contingent liability a payment will be applied to the former.<sup>5</sup>

The rule under consideration for applying an indefinite payment to the debts which first accrued applies not only to the first items of an account but to distinct debts contracted at different times.<sup>6</sup> The rule is not unjust or prejudicial to a debtor; it operates, however, more beneficially to the creditor; for it

<sup>1</sup> *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160; *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. Rep. 430; *Worthley v. Emerson*, 116 Mass. 374; *Truscott v. King*, 6 N. Y. 147; *The A. R. Dunlap*, 1 Low. 350; *Moore v. Gray*, 22 La. Ann. 289; *Cushing v. Wyman*, 44 Me. 121; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271, 9 N. W. Rep. 590; *Miller v. Miller*, 23 Me. 23, 39 Am. Dec. 597. But see *Pierce v. Sweet*, 33 Pa. 151; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Schuelenberg v. Martin*, 2 Fed. Rep. 747. The last case is distinguishable because the payment was not a voluntary one; a fact which the court failed to observe.

<sup>2</sup> *Thurlow v. Gilmore*, 40 Me. 378.

<sup>3</sup> *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. Rep. 248.

<sup>4</sup> *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. Rep. 263; *Morgan v. Tarbell*, 28 Vt. 498.

<sup>5</sup> *Missouri Central Lumber Co. v.*

*Stewart*, 78 Mo. App. 456; *Niagara Bank v. Roosevelt*, 9 Cow. 409.

<sup>6</sup> *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Thompson v. Phelan*, 22 N. H. 339; *McDaniel v. Barnes*, 5 Bush, 183; *Robinson's Adm'r v. Allison*, 36 Ala. 526; *Byrne v. Grayson*, 15 La. Ann. 457; *Upham v. Lefavour*, 11 Met. 174; *Langdon v. Bowen*, 46 Vt. 512; *Smith v. Loyd*, 11 Leigh, 512, 37 Am. Dec. 621; *Jones v. United States*, 7 How. 681; *McKinzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Allstan v. Contee*, 4 Har. & J. 351; *Draffen v. Boonville*, 8 Mo. 395; *Copland v. Toulmin*, 7 Cl. & F. 349; *Simson v. Ingham*, 2 B. & C. 72; *Hooker v. Keay*, 1 Q. B. Div. 178.

This rule will not be applied to payments made by a reorganized partnership without the consent of its new members. *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea. 695; *Burland v. Nash*, 2 F. & F. 687; *Thompson v. Brown*, 1 Mood. & M. 406; *Roakes v. Bailey*, 55 Vt. 542.

often saves a debt from the bar of the statute of limitations, and closes the door to the older transactions which it may be presumed are more difficult of proof. But the rule applies the payments in the natural and logical order of the transactions. It is not supported, however, by reasons so cogent but that it will yield when there is evidence of a contrary intention,<sup>1</sup> or where some superior equity requires a different application.<sup>2</sup> "Whenever the relation of the parties or the nature of the account or transaction between them shows that an appropriation of payments to the earliest items of the account would do injustice between them or fail to conform to their understanding or agreement, another application is made."<sup>3</sup> If property is exempt from execution the rule that partial payments shall be so appropriated as to protect the creditor does not apply so as to affect such property any more than such payments would revive a debt barred by time.<sup>4</sup>

**§ 244. General payment applied to a debt bearing interest, and first to interest.** As between debts bearing and those not bearing interest, the law directs an indefinite payment to be applied to the former.<sup>5</sup> The reason generally assigned is that of relieving the debtor in respect to the debt which is most burdensome, or the presumed choice of the debtor.<sup>6</sup> This may be conceded to be sufficient for this application, and some others, where a particular one is specially beneficial to a debtor without being attended with a corresponding loss to the creditor which the law is equally solicitous to prevent. Interest due is first to be satisfied when a general payment is made, and if there be a surplus it is to be applied to the principal. If the payment falls short of the interest, the balance of the interest is not to be added to the principal, but remains to be extinguished by the next payment, if it is sufficient.<sup>7</sup> This rule yields to that which requires that

<sup>1</sup> City Discount Co. v. McLean, L. R. 9 C. P. 692; Langdon v. Bowen, 46 Vt. 512.

<sup>2</sup> Upham v. Lefavour, 11 Met. 174.

<sup>3</sup> Faisst v. Waldo, 57 Ark. 270, 21 S. W. Rep. 436.

<sup>4</sup> Sternberger v. Gowdy, 93 Ky. 146, 19 S. W. Rep. 186.

<sup>5</sup> Heyward v. Lomax, 1 Vern. 24;

Scott v. Fisher, 4 T. B. Mon. 387; Blanton v. Rice, 5 id. 253; Bacon v. Brown, 1 Bibb, 334, 4 Am. Dec. 640; Scott v. Cleveland, 33 Miss. 447; Bussey v. Gant's Adm'r, 10 Humph. 238.

<sup>6</sup> Id. See Neal v. Allison, 50 Miss. 175.

<sup>7</sup> Weide v. St. Paul, 62 Minn. 67, 64

the debt least secured shall first be paid; hence if the claim for interest is better secured than the principal the application will be in favor of the latter;<sup>1</sup> and is not to be applied where the defendant in foreclosure appeals and gives a bond for the payment, if the judgment be affirmed, of such interest as might accrue and remain otherwise unpaid upon the decree from the date thereof. On affirmance of such judgment the proceeds of the sale will be applied to meet the fees, costs and principal before satisfying the interest on the decree; the deficiency, if any, will thereby be secured by the appeal bond. "It would not be in accordance with natural justice or with the rules which govern courts of equity to allow appellant to delay a sale by his appeal and render the security inadequate to pay the accruing interest, and then, upon a sale, discharge the interest from the proceeds of such security and free him from his obligation."<sup>2</sup>

Where a debt bearing interest remains unpaid until interest is due on the interest, where that is permitted, general payments are to be applied, first, to such interest on interest; second, to interest on the principal; and third, to the principal.<sup>3</sup> And in applying payments on a sum secured by a

N. W. Rep. 65; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514; *Morgan v. Michigan Air Line R. Co.*, 57 Mich. 430, 25 N. W. Rep. 161, 26 id. 865; *Bradford Academy v. Grover*, 55 Vt. 462; *Case v. Fish*, 58 Wis. 56, 15 N. W. Rep. 808; *Hurst v. Hite*, 20 W. Va. 183; *Frazier v. Hyland*, 1 Har. & J. 98; *Gwinn v. Whitaker*, id. 754; *Bond v. Jones*, 8 Sm. & M. 368; *Spires v. Hamot*, 8 W. & S. 17; *Peebles v. Gee*, 1 Dev. 341; *Hampton v. Dean*, 4 Tex. 455; *Hearn v. Cutberth*, 10 id. 216; *McFadden v. Fortier*, 20 Ill. 509; *Hart v. Dorman*, 2 Fla. 445; *Lash v. Edgerton*, 13 Minn. 210; *Hammer v. Nevill*, Wright, 169; *Estebene v. Estebene*, 5 La. Ann. 738; *Union Bank v. Lobdell*, 10 id. 130; *Bird v. Lobdell*, id. 159; *Johnson v. Robbins*, 20 id. 569; *Moore v. Kiff*, 78 Pa. 96; *Williams v. Houghtaling*, 3 Cow. 86; *Righter v. Stall*, 3 Sandf. Ch. 608;

*State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *People v. New York County*, 5 Cow. 331; *Jencks v. Alexander*, 11 Paige, 619; *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189; *Johnson v. Johnson*, 5 Jones' Eq. 167; *De Bruhl v. Neuffer*, 1 Strobh. 426. See *Mercer's Adm'r v. Beale*, 4 Leigh, 189.

If part of the interest is barred by the statute of limitations an unappropriated payment will not be applied to its discharge because it is not wholly due. In *re Fitzmaurice's Minors*, 15 Irish Ch. 445.

<sup>1</sup>*Smythe v. New England Loan & Trust Co.*, 12 Wash. 424, 41 Pac. Rep. 184.

<sup>2</sup>*Monson v. Meyer*, 190 Ill. 105, 60 N. E. Rep. 63, 92 Ill. App. 127.

<sup>3</sup>*Anketel v. Converse*, 17 Ohio St. 11.



penal bond, they will be applied to the interest in the first instance, although their sum exceeds the penalty.<sup>1</sup> A payment of usury will be applied in law to discharge the amount legally due.<sup>2</sup> Payments received on a debt bearing interest before either is due should be applied to pay the principal and the interest accrued on that part of the principal so extinguished.<sup>3</sup> The rule which applies a general payment first to interest due, rather than principal, is directly opposite to that which applies a payment on an interest-bearing debt in preference to one not bearing interest; it does not favor the debtor, but the creditor; for the law in some states allowing interest due to bear interest is exceptional.

§ 245. General payments applied to the debt least secured; comments on conflicting views of the general subject. If one debt be secured and another not, and a general payment is made, the prevailing rule is that the court will apply it to the debt which is not secured, or that for which the

<sup>1</sup> Smith v. Macon, 1 Hill Ch. (S. C.) 339.

<sup>2</sup> Atlanta Savings Bank v. Spencer, 107 Ga. 629, 33 S. E. Rep. 878; Burrows v. Cook, 17 Iowa, 436; Parchman v. McKinney, 12 Sm. & M. 631; Stanley v. Westrop, 16 Tex. 200; Bartholomew v. Yaw, 9 Paige, 165. See § 236.

In a suit under the national bank act to recover usurious interest and the forfeiture provided for, if occasional settlements have been made by the parties, payments deducted from the principal and interest then due and new notes given for the balances, the payments will be applied *pro rata* to the principal and interest due at the time. Kinser v. Farmers' Nat. Bank, 58 Iowa, 728, 13 N. W. Rep. 59.

<sup>3</sup> Righter v. Stall, 3 Sandf. Ch. 608; Jencks v. Alexander, 11 Paige, 619; Williams v. Houghtaling, 3 Cow. 86; Miami Exporting Co. v. United States Bank, 5 Ohio, 260.

In Starr v. Richmond, 30 Ill. 276,

83 Am. Dec. 189, Walker, J., said: "It appears to be more equitable and just that when the holder receives money before it is due, on a demand drawing interest, it should be applied, in the absence of an agreement to the contrary, to the principal. Otherwise, by loaning the sum thus received, he would, in effect, compound the interest, or have placed at interest before its maturity a larger sum than his original claim. In other words, he would receive interest on the maker's money as well as his own. After the principal and interest both become due it would be otherwise. The court below, we think, erred in applying any portion of the payment made before the maturity of the note to the extinguishment of interest, but should have appropriated the whole of the payment to the principal." McElrath v. Dupuy, 2 La. Ann. 520; Fay v. Lovejoy, 20 Wis. 407.

security is most precarious.<sup>1</sup> The rule has been applied to money recovered from a defaulting officer by his sureties and paid over by them to the government, his defalcation being in [423] excess of their liability.<sup>2</sup> If, however, the security of one of the debts is by a surety, a general payment will be applied to the debt for which he is liable that he may be relieved.<sup>3</sup>

<sup>1</sup> *Sternberger v. Gowdy*, 93 Ky. 146, 19 S. W. Rep. 186; *Chicago Title & Trust Co. v. McGlew*, 90 Ill. App. 58; *Monson v. Meyer*, 93 Ill. App. 94, 190 Ill. 105, 60 N. E. Rep. 63; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. Rep. 746; *Price v. Merritt*, 55 Mo. App. 640; *McMillan v. Grayston*, 83 Mo. App. 425; *Smith v. Lewiston Steam Mill*, 66 N. H. 613, 34 Atl. Rep. 153; *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. Rep. 768; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. Rep. 940; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. Rep. 685; *The Katie O'Neil*, 65 Fed. Rep. 111; *Garrett's Appeal*, 100 Pa. 597; *Goetz v. Piel*, 26 Mo. App. 634, 643; *Nichols v. Knowles*, 3 McCrary, 477, 17 Fed. Rep. 494; *Sanborn v. Stark*, 31 id. 18; *McCurdy v. Middleton*, 82 Ala. 131, 2 So. Rep. 721; *Poulson v. Collier*, 18 Mo. App. 583; *The D. B. Steelman*, 5 Hughes, 210; *Hare v. Stegall*, 60 Ill. 380; *Wilhelm v. Schmidt*, 84 id. 183; *Plain v. Roth*, 107 id. 588; *Frazier v. Lanahan*, 71 Md. 131, 17 Atl. Rep. 940, 17 Am. St. 516; *Lester v. Houston*, 101 N. C. 605, 8 S. E. Rep. 366; *North v. La Flesh*, 73 Wis. 520, 41 N. W. Rep. 633; *McDaniel v. Barnes*, 5 Bush, 183; *Thomas v. Kelsey*, 30 Barb. 268; *Blanton v. Rice*, 5 T. B. Mon. 253; *Field v. Holland*, 6 Cranch, 8; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Foster v. McGraw*, 64 Pa. 464; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Johnson's Appeal*, 37 Pa. 268; *Langdon v. Bowen*, 46 Vt. 512; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261; *Gaston v. Barney*, 11 Ohio St. 510;

*Moss v. Adams*, 4 Ired. Eq. 42; *Ransour v. Thomas*, 10 Ired. 164; *State v. Thomas*, 11 id. 251; *Jenkins v. Beal*, 70 N. C. 440; *Sprinkle v. Martin*, 72 id. 92; *Chester v. Wheelwright*, 15 Conn. 562; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Gordon v. Hobart*, 2 Story, 243; *Taylor v. Talbot*, 2 J. J. Marsh. 49; *Sager v. Warley*, Rice Ch. (S. C.) 26; *Heilbron v. Bissell*, 1 Bailey Eq. 430; *Gregory v. Forrester*, 1 McCord Ch. 318; *Smith v. Wood*, 1 N. J. Eq. 74; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Baine v. Williams*, 10 Sm. & M. 113; *McQuaide v. Stewart*, 48 Pa. 198; *Smith v. Brooke*, 49 id. 147; *Planters' Bank v. Stockman*, 1 Freeman's Ch. 502.

<sup>2</sup> *Alexander v. United States*, 6 C. C. A. 602, 57 Fed. Rep. 828.

<sup>3</sup> *Pritchard v. Comer*, 71 Ga. 18; *Pearl v. Deacon*, 1 De G. & J. 461; *Kinnaird v. Webster*, 10 Ch. Div. 139; *Berghaus v. Alter*, 9 Watts, 386; *Ross v. McLauchlan*, 7 Gratt. 86; *Marryatts v. White*, 2 Stark. 101; *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52; *Bridenbecker v. Lowell*, 32 Barb. 9.

Where one of several accommodation makers of a note has notified the payee and holder of his desire to terminate his liability, he cannot claim in diminution thereof on account of outstanding advances money paid to the holder by the accommodation payee after such revocation, such money being the proceeds of the business of the payee conducted on money advanced on the credit of the other accommodation makers. *Patterson v. Bank of British Columbia*, 26 Ore. 509, 38 Pac. Rep. 817.

No one except a surety will be heard to contend for a different application. The court cannot go outside the case to see whether or not equity requires that other than the parties to the record shall be protected; and, it seems, that in the absence of fraud or imposition on the surety he has no equity to control the application of a payment for which he is bound.<sup>1</sup> One liable as guarantor for the prompt payment of interest on a mortgage cannot, in an action upon the guaranty, after a foreclosure sale which failed to bring the amount due on principal and interest, assert the right to have the money applied to the interest.<sup>2</sup> In some states the courts, carrying the rule first stated in this section to greater length, hold that the application will be made to the debt which bears heaviest upon the debtor, and apply a general payment so as to discharge a debt for which he has given security in preference to an unsecured demand in order to release the collateral.<sup>3</sup>

There is a marked conflict of decision upon this point relating to the application by the court of indefinite payments arising, as before intimated, from the diverse judicial assumptions on the one hand, that such payments are as a general rule to be applied in the manner most beneficial to the debtor, and on the other, that they are to be applied most beneficially to the creditor.<sup>4</sup> No court, however, has so far relied upon [424]

<sup>1</sup> Richards' Estate, 185 Pa. 155, 39 Atl. Rep. 1117; Stamford Bank v. Benedict, 15 Conn. 444.

<sup>2</sup> Smythe v. New England Loan & Trust Co., 12 Wash. 424, 41 Pac. Rep. 184.

<sup>3</sup> Compound Lumber Co. v. Murphy, 169 Ill. 343, 48 N. E. Rep. 472; Frazier v. Lanahan, 71 Md. 131, 17 Atl. Rep. 940, 17 Am. St. 516; Griswold v. Onondaga County Savings Bank, 93 N. Y. 301; Pattison v. Hull, 9 Cow. 747; Dows v. Morewood, 10 Barb. 183; Poindexter v. La Roche, 7 Sm. & M. 699; Dorsey v. Gassaway, 2 Har. & J. 402, 3 Am. Dec. 557; McTavish v. Carroll, 1 Md. Ch. 160 (but see Gwinn v. Whitaker, 1 Har. & J. 754); The Antarctic, 1 Sprague, 206; Neal v. Allison, 50 Miss. 175. See Thatcher v. Massey, 20 S. C. 542.

Payments will be so applied as to save a debtor's homestead. First Nat. Bank v. Hollinsworth, 78 Iowa, 575, 43 N. W. Rep. 536.

<sup>4</sup> So much has this assumption of favoring one party or the other as a rule entered into the judgment of the courts, that it has been a convenient resort for determining incidental questions. Thus where it was proved that a payment was made in a certain year, but the day and month could not be shown, the court directed the credit to be given as of the last day of the year, a day most favorable to the creditor. Byers v. Fowler, 14 Ark. 86. See Anderson v. Mason, 6 Dana, 217; Bank of Portland v. Brown, 23 Me 295.

If the course of dealing between the parties indicates an understand-

either assumption as to resolve all questions by it. As before stated, neither assumption, apart from some special ground, is founded in reason or principle. Neither party, by reason merely of being debtor or creditor, has any claim to be preferred; each as a general rule has had an election to appropriate the payment, and each having waived it has an equal claim to a just application by the court. The rule that the debt which is least secured should be first paid, where there are no special circumstances, stands on very slight preponderance of equity. The most that can be said for it was said by Marshall, C. J.: "It being equitable that the whole debt should be paid it cannot be inequitable to extinguish first those debts for which the security is most precarious;"<sup>1</sup> and it is not surprising that the humane consideration of relieving the debtor of the more burdensome debt should determine the application the other way. But the rule to pay first the debt least secured seems to be supported by a decided weight of authority.

There is also considerable contrariety of decision upon other points relative to the application of payments by the court. The cases agree that an indefinite payment is to be applied to the oldest debt, where no other rule of appropriation conflicts; but it often occurs that another and sometimes several rules do conflict. Then the relative force of the conflicting rules and the particular circumstances must control the application. That rule is often met by the rule that the least secured debt shall be first paid. Both may be said to operate in favor of the creditor, but they do not always conduce to the same application. The latter is paramount when no circumstances exist to increase the force of the other. Where the secured and unsecured debts are by mutual consent items in a general account current, and especially if, by like consent, the payment is also credited in the account, the rule for applying the credit to the oldest items prevails, notwithstanding the partial security;<sup>2</sup> but not without dissent. Where the creditor's security consisted in retaining title to the property sold, and the purchase price of the articles so conditionally sold constituted

ing that payments are to be applied in the way most beneficial to the creditor the court will give effect to it. *Gwin v. McLean*, 62 Miss. 121.

<sup>1</sup> *Field v. Holland*, 6 Cranch, 8.

<sup>2</sup> § 243.

the earliest items in the account, and the payments were, by mutual consent, entered as credits therein, the interest [425] of the purchaser to perfect his title to the property was deemed to preponderate against the interest of the creditor to obtain payment of his unsecured, rather than his secured, claims; and the concurrence of the parties in making the transaction a matter of account evinced their intention that the payments should satisfy the charges in the order of their entry.<sup>1</sup>

## SECTION 3.

## ACCORD AND SATISFACTION.

§ 246. **Definition.** A claim or demand may be satisfied by the party liable delivering, paying or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree.<sup>2</sup> It is a substituted payment. When

<sup>1</sup> Crompton v. Pratt, 105 Mass. 255.

In Pointer v. Smith, 7 Heisk. 137, A., a Tennessean, as agent, hired out in Alabama the slaves of several Tennesseans, and afterwards received in Alabama a part of the hire, without any appropriation at the time by either agent receiving or the debtor paying. Held, that the law of Alabama would govern as to the subsequent appropriation of the payment; but in the absence of any proof as to the law thereof, applicable to the circumstances, the debtor could not make a subsequent appropriation, and it should be distributed *pro rata*.

In Smith v. Union Bank of Georgetown, 5 Pet. 518, it was held that the right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased; and, therefore, where administration was taken under the laws of Maryland of assets there, where all debts are of equal dignity, and the intestate was domiciled and owed a bond debt in Vir-

ginia, where bond debts have a preference, the latter debt had no prior right of payment out of the assets in Maryland.

<sup>2</sup> If the amount due is unliquidated and the party owing it makes an offer of a less sum in settlement and attaches thereto the condition that if the sum is taken at all it must be received in full or in satisfaction, and the other party receives it with knowledge of the condition, he takes it subject thereto, and it operates as a full accord and satisfaction notwithstanding the payee, at the time of receiving it, declares that he takes it in satisfaction *pro tanto* only. *McDaniels v. Bank*, 29 Vt. 230, 70 Am. Dec. 406; *Preston v. Grant*, 34 Vt. 201; *Berdell v. Bissell*, 6 Colo. 162; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95, 4 Atl. Rep. 634; *Bull v. Bull*, 34 Conn. 455; *Patten v. Douglass*, 44 id. 541.

If a party injured, with knowledge of all the facts, demands and receives from the wrong-doer a sum of money on account of the injury, either in whole or in part, it is presumed that it was intended as a full recompense,

such agreement is executed — carried fully into effect<sup>1</sup>— the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates *accord and satisfaction*. It is a discharge of the former obligation or liability by the receipt of a new consideration mutually agreed upon.<sup>2</sup> The rule requiring that an accord be executed is satisfied if the creditor accepts the promise of the debtor to perform some act in future in satisfaction of the debt, and where that is the case the debt is extinguished without performance.<sup>3</sup> But there is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. In the latter case a tender of performance, although made promptly and in good faith, is not satisfaction.<sup>4</sup>

[426] § 247. **Consideration.** For the purpose of supporting such an agreement and giving it effect, the law treats all considerations which have value, without regard to the extent of that value, as sufficient, as it does in all other cases of contract; — inadequacy is not a valid objection; a court will not consider the disparity, if there is any, between the value of the liability discharged and the thing done or promised, which forms the consideration, if the latter is of some value.<sup>5</sup> The

and it is an accord and satisfaction. *Hinkle v. Minneapolis, etc. R. Co.*, 31 Minn. 434, 18 N. W. Rep. 275. But it is otherwise if the party in fault pays money voluntarily, and not in response to a claim made by the other, or if any fact gives the payment the character of a gratuity. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169, 42 N. W. Rep. 863.

<sup>1</sup> *Swofford Brothers Dry Goods Co. v. Goss*, 65 Mo. App. 55; *Wenz v. Meyersohn*, 59 App. Div. 130, 68 N. Y. Supp. 1091; *First Nat. Bank v. Leech*, 36 C. C. A. 262, 94 Fed. Rep. 310; *Crow v. Kimball Lumber Co.*, 16 C. C. A. 127, 69 Fed. Rep. 127; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. Rep. 52; *Omaha F. Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. Rep. 30; *Carpenter v. Chicago, etc. R. Co.*, 7 S. D. 584,

64 N. W. Rep. 1120; *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. Rep. 300.

<sup>2</sup> *Vanbebbber v. Plunkett*, 26 Ore. 562, 569, 38 Pac. Rep. 707, 27 L. R. A. 811, quoting the text; *Bush v. Abraham*, 25 Ore. 336, 345, 35 Pac. Rep. 1066, quoting the text.

<sup>3</sup> *Smith v. Elrod*, 122 Ala. 269, 24 So. Rep. 994; *Knowles v. Knowles*, 128 Ill. 110, 29 N. E. Rep. 196; *Potts v. Polk County*, 80 Iowa, 401, 45 N. W. Rep. 775; *Averill v. Wood*, 78 Mich. 342, 44 N. W. Rep. 381; *Oregon Pacific R. Co. v. Forrest*, 128 N. Y. 83, 28 N. E. Rep. 137; *Babcock v. Hawkins*, 23 Vt. 561; *Sharp v. Mauston*, 92 Wis. 629, 66 N. W. Rep. 803. See § 252.

<sup>4</sup> *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. Rep. 52.

<sup>5</sup> *Savage v. Everman*, 70 Pa. 315,

receipt of money paid into court by the defendant does not deprive the plaintiff of his right to collect the balance due unless the payment was accompanied by a condition that the sum must be accepted in full satisfaction.<sup>1</sup>

**§ 248. Payment of part of a debt will not support agreement to discharge the whole:** Where there is an overdue money demand, liquidated and not disputed, and a part only of it is paid, though this is accepted as full satisfaction, there is only a part performance of the obligation in kind; the agreement to discharge the residue is void for want of consideration. All claims for damages, for torts committed, or for contracts broken, are payable in money. When a demand therefor is certain, or rendered certain by agreement or adjudication, and is no longer disputed, it cannot be satisfied with any less amount than the precise sum owing. If a part is paid there is a partial performance of the obligation of the party liable, and no more. His payment is only a discharge *pro tanto*. This part payment may have been induced solely by the assurance that it would be accepted as full satisfaction, and it may have been impossible to compel payment; still, the party paying has done in kind only what he was under a legal obligation to do in respect to the amount paid, and the corresponding amount of the obligation is thereby satisfied, but no more; therefore the agreement of the creditor to discharge the residue is, in a legal sense, gratuitous and not binding.<sup>2</sup>

10 Am. Rep. 676; Hartman v. Danner, 74 Pa. 33; Very v. Levy, 13 How. 345; Hardman v. Bellhouse, 9 M. & W. 596; Sibree v. Tripp, 15 id. 23; Booth v. Smith, 3 Wend. 66; Kellogg v. Richards, 14 id. 116; Steinman v. Magnus, 11 East, 390; Lewis v. Jones, 4 B. & C. 506; Blinn v. Chester, 5 Day, 360; Webster v. Wyser, 1 Stew. 184; Davis v. Noaks, 3 J. J. Marsh. 497; Wood v. Roberts, 2 Stark. 417; Boothby v. Sowden, 3 Camp. 175; Bradley v. Gregory, 2 id. 383; Bush v. Abraham, 25 Ore. 336, 35 Pac. Rep. 1066; Griffith v. Creighton, 61 Mo. App. 1; Howard v. Morton, 65 Barb. 161. See § 249.

<sup>1</sup> Cooley v. Kinney, 119 Mich. 377, 78 N. W. Rep. 332.

<sup>2</sup> Swofford Brothers Dry Goods Co. v. Goss, 65 Mo. App. 55; Morrill v. Baggott, 157 Ill. 240, 41 N. E. Rep. 639; Hart v. Strong, 183 Ill. 349, 55 N. E. Rep. 629; Pottlitzer v. Wesson, 8 Ind. App. 472, 35 N. E. Rep. 1030; Jennings v. Durlinger, 23 Ind. App. 673, 55 N. E. Rep. 979; Stengel v. Preston, 11 Ky. L. Rep. 976, 13 S. W. Rep. 839; Leeson v. Anderson, 99 Mich. 247, 58 N. W. Rep. 72; Wetmore v. Crouch, 150 Mo. 671, 51 S. W. Rep. 738; Griffith v. Creighton, 61 Mo. App. 1; Howe v. Robinson, 13 N. Y. Misc. 256, 34 N. Y. Supp. 85;

[427] The actual value of a debt or demand depends on the probability of voluntary payment, or the possibility of collection by legal process. Where a debt is doubtful, a creditor may obtain a part of the nominal amount by discharging the residue, and thus realize all that it is actually worth, and per-

Jones v. Rice, 19 N. Y. Misc. 357, 43 N. Y. Supp. 491; Toledo v. Sanwald, 13 Ohio Ct. Ct. 496 (applying the rule to a judgment); Mt. Holly Water Co. v. Mt. Holly Springs, 10 Pa. Super. Ct. 162; Commonwealth v. Cummins, 155 Pa. 30, 25 Atl. Rep. 996; Chicago, etc. R. Co. v. Clark, 35 C. C. A. 120, 92 Fed. Rep. 968 (the opinion of Lacombe, C. J., reviews many cases); Hodges v. Truax, 19 Ind. App. 651, 49 N. E. Rep. 1079; Rued v. Cooper, 119 Cal. 463, 51 Pac. Rep. 704; Gurley v. Hiteshue, 5 Gill, 217; Markel v. Spitler, 28 Ind. 488; Dederick v. Leman, 9 Johns. 333; Harris v. Close, 2 Johns. 448, 3 Am. Dec. 244; Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380; White v. Jordan, 27 Me. 370; Latapee v. Pecholier, 2 Wash. C. C. 180; Warren v. Skinner, 20 Conn. 559; Campbell v. Booth, 8 Md. 107; Curtiss v. Martin, 20 Ill. 575; Donohue v. Woodbury, 6 Cush. 150; Bryant v. Proctor, 14 B. Mon. 451; Williams v. Langford, 15 id. 566; Conkling v. King, 10 Barb. 372, 10 N. Y. 440; Keeler v. Salisbury, 33 N. Y. 648; Fellows v. Stevens, 24 Wend. 299; Harper v. Graham, 20 Ohio, 105; Fell v. McHenry, 42 Pa. 41; Pierson v. McCahill, 21 Cal. 122; Irvine v. Millbank, 56 N. Y. 635; Hinckley v. Arey, 27 Me. 362; Riley v. Kershan, 53 Mo. 224; Peterson v. Wheeler, 45 id. 369; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Bailey v. Day, 26 Me. 88; Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424; Lewis v. Jones, 6 D. & R. 567, 4 B. & C. 513; Ogborn v. Hoffman, 52 Ind. 439; Keen v. Vaughan, 48 Pa. 477; Carrington v. Crocker, 37 N. Y. 336; Cumber v. Wane, 1 Str. 426; Sibree v. Tripp, 15 M. & W. 23; Fitch v. Sutton, 5 East, 230; Pinnell's Case, 5 Rep. 117; Lynn v. Bruce, 2 H. Bl. 317; Thomas v. Heathorn, 2 B. & C. 477; Mitchell v. Cragg, 10 M. & W. 367; Skaife v. Jackson, 3 B. & C. 421; Graves v. Key, 3 B. & Ad. 313; Straton v. Rastall, 2 T. R. 366; Churchill v. Bowman, 39 Vt. 518; Hardey v. Coe, 5 Gill, 189; Smith v. Bartholomew, 1 Met. 276, 35 Am. Dec. 365; Arnold v. Park, 8 Bush, 3; Tyler v. Odd Fellows' Mut. Relief Ass'n, 145 Mass. 134, 13 N. E. Rep. 360; Smith v. Chilton, 84 Va. 840, 6 S. E. Rep. 142; Martin v. Frantz, 127 Pa. 389, 14 Am. St. 859, 18 Atl. Rep. 20; Hayes v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. Rep. 322; Sheibley v. Dixon County, 61 Neb. 409, 85 N. W. Rep. 399; Helling v. United Order of Honor, 29 Mo. App. 309; Emmittsburg R. Co. v. Donoghue, 67 Md. 383, 1 Am. St. 396, 10 Atl. Rep. 233; St. Louis, etc. R. Co. v. Davis, 35 Kan. 464, 11 Pac. Rep. 421; Foakes v. Beer, 9 App. Cas. 605, 11 Q. B. Div. 221; Eldred v. Peterson, 80 Iowa, 264, 20 Am. St. 416, 45 N. W. Rep. 755.

In *Gordon v. Moore*, 44 Ark. 349, 355, 51 Am. Rep. 606, it is held "that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into effect by the receipt of the money, and the execution of a formal and positive release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act."



haps more. For this reason the rule stated has been regarded by the courts as only a technical one; and they have satisfied it on nice distinctions;<sup>1</sup> or, as has been judicially said, "they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract if possible from the circumstances of each case a consideration for the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement."<sup>2</sup>

§ 248a. *Same subject.* In a recent case the Mississippi court refused to recognize the rule stated in the last section, notwithstanding it had been applied there. In a strong opinion Woods, C. J., argues that the case in Coke<sup>3</sup> which is relied upon as the foundation of the rule decided no such question. "An examination of that mischievous and misleading reported case will make it appear at once that the question before us was not in any way involved. Pinnel's plea was that, before the maturity of his bond for the larger sum, plaintiff had accepted a lesser sum agreed upon between the parties, in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel, in that remote period when courts were almost as zealous for the observance of technical rules of special pleading as for the execution of justice ac-

<sup>1</sup> Kellogg v. Richards, 14 Wend. 116; Smith v. Ballou, 1 R. I. 496; Harper v. Graham, 20 Ohio. 105; Brooks v. White, 2 Met. 283, 37 Am. Dec. 95; McDaniels v. Lapham, 21 Vt. 222. See Weymouth v. Babcock, 42 Me. 44; Milliken v. Brown, 1 Rawle, 391; Lamb v. Goodwin, 10 Ired. 320; McDaniels v. Bank, 29 Vt. 230; Mathis v. Bryson, 4 Jones, 509; Brink v. Garland, 58 Mo. App. 356.

In Woolfolk v. McDowell, 9 Dana, 268, a creditor accepted his own note outstanding in the hands of a third person, in satisfaction of a larger amount against his debtor, but worth

less because the debtor was unable to pay it. Judge Marshall said: "We think his acceptance is sufficient to establish the adequacy of the satisfaction. It cannot be said that there was no consideration for giving up any part of the debt of the defendant, because although the value of the entire consideration given can be measured, there is no measure of the value of the debt which the defendant could not pay."

<sup>2</sup> Jaffray v. Davis, 124 N. Y. 164, 26 N. E. Rep. 351, 11 L. R. A. 710.

<sup>3</sup> Pinnel's Case, 5 Rep. 117.

according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him because of his 'insufficient pleading, for,' says Coke, 'he did not plead that he had paid the 5*l.* 2*s.* 2*d.* in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction.'” After showing that the courts of this country generally adopted the rule supposed to be so laid down, the writer comes to the question of consideration, the absence of which is usually given as the reason for the rule: “The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it — that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often — nay, generally — greatly to the benefit of the creditor. Why shall not money — the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself — why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not be legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note? No reason can be assigned, except that just ad-

verted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it."<sup>1</sup>

**§ 249. Any other act or promise which is a new consideration will suffice.** If there be any benefit or even legal [428] possibility of benefit<sup>2</sup> to the creditor thrown in, the additional weight will turn the scale and render the consideration sufficient to support the agreement.<sup>3</sup> Payment at a different place,<sup>4</sup> or before the original debt is due,<sup>5</sup> is sufficient. So if, instead of offering payment of a less sum, the debtor procures a third person to become security, either by engaging his personal

<sup>1</sup> Clayton v. Clark, 74 Miss. 499, 60 Am. St. 521, 37 L. R. A. 771, 21 So. Rep. 565, 22 id. 189, modifying or overruling Jones v. Perkins, 29 Miss. 139; Pulliam v. Taylor, 50 Miss. 251, and Burrus v. Gordon, 57 Miss. 93. To much the same effect as the principal case is Harper v. Graham, 20 Ohio, 105. See Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. Rep. 414.

<sup>2</sup> "What is called 'any benefit, or even any legal possibility of benefit,' is not that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." Foakes v. Beer, 9 App. Cas. 605 (1884). Compare the preceding section.

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<sup>3</sup> Grayson's Appeal, 108 Pa. 581; Hendrick v. Thomas, 106 Pa. 327; Tyson v. Woodruff, 108 Ga. 368, 33 S. E. Rep. 981; 1 Smith Lead. Cas. 600; Steinman v. Magnus, 2 Camp. 124; Bradley v. Gregory, id. 383; Wood v. Roberts, 2 Stark. 417; Boothby v. Snowden, 3 Camp. 175; Sibree v. Tripp, 15 M. & W. 23; Bidder v. Bridges, 37 Ch. Div. 406.

<sup>4</sup> Smith v. Brown, 3 Hawks, 580; Harper v. Graham, 20 Ohio, 105; Austin v. Dorwin, 21 Vt. 39; Spann v. Baltzell, 1 Fla. 302, 46 Am. Dec. 346; Arnold v. Park, 8 Bush, 3; Milliken v. Brown, 1 Rawle, 391.

<sup>5</sup> Sonnenberg v. Riedel, 16 Minn. 83; Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 200; Brooks v. White, 2 Met. 283, 37 Am. Dec. 95; Levy v. Very, 12 Ark. 148; Boyd v. Moats, 75 Iowa, 151, 39 N. W. Rep. 237; Schweider v. Lang, 29 Minn. 254, 13 N. W. Rep. 33; Ricketts v. Hall, 2 Bush, 249, 43 Am. Rep. 302; Smith v. Brown, 3 Hawks, 580.

credit or pledging his property for the payment of a smaller sum;<sup>1</sup> or the payment of such sum by a third person;<sup>2</sup> or if the debtor alone gives negotiable paper for a smaller sum to satisfy a larger debt not in negotiable form;<sup>3</sup> or if one of several joint debtors, whether in partnership or not, does so, and the note or bill, and not the payment of it, is accepted as satisfaction, it is valid; giving such security is a new consideration, for it may be more advantageous than the debt in its previous form.<sup>4</sup> Giving notes for smaller sums than the amount of the indebtedness which was represented by a single note, so that the creditor may sue on them in justice's court, is a suff-

<sup>1</sup> *Lincoln Savings Bank & Safe Deposit Co. v. Allen*, 27 C. C. A. 87, 82 Fed. Rep. 148; *Keeler v. Salisbury*, 33 N. Y. 648; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95; *Babcock v. Dill*, 43 Barb. 577; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Harrison v. Close*, 2 Johns. 448, 3 Am. Dec. 444; *Seymour v. Minturn*, 17 Johns. 169, 8 Am. Dec. 380; *Conkling v. King*, 10 N. Y. 440; *Welby v. Drake*, 1 C. & P. 557; *Belshaw v. Bush*, 11 C. B. 191; *James v. Isaacs*, 12 id. 791; *Steinman v. Magnus*, 11 East, 390; *Henderson v. Stobart*, 5 Ex. 99; *Dias v. Wanmaker*, 1 Sandf. 469; *Seymour v. Goodrich*, 80 Va. 303; *Bidder v. Bridges*, 37 Ch. Div. 406; *Roberts v. Brandies*, 44 Hun, 468; *Varney v. Conery*, 77 Me. 527, 1 Atl. Rep. 683; *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. Rep. 373. See *Warburg v. Wilcox*, 7 Abb. Pr. 336.

<sup>2</sup> *Fowler v. Smith*, 153 Pa. 639, 25 Atl. Rep. 744; *Clark v. Abbott*, 53 Minn. 88, 55 N. W. Rep. 542, 39 Am. St. 577; *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. Rep. 373; *Varney v. Conery*, 77 Me. 527, 1 Atl. Rep. 683; *Welby v. Drake*, 1 C. & P. 557; *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290.

<sup>3</sup> *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. Rep. 351, 11 L. R. A. 710, distinguishing or disapproving *Keeler*

*v. Salisbury*, 73 N. Y. 653, and *Platts v. Walrath*, *Lalor's Supp.* 59; *Mechanics' Bank v. Houston*, 11 W. N. C. 388 (Pa. Sup. Ct.); *Curlewis v. Clark*, 3 Ex. 375; *Cooper v. Parker*, 15 C. B. 825; *Sibree v. Tripp*, 15 M. & W. 23; *Goddard v. O'Brien*, 9 Q. B. Div. 37.

<sup>4</sup> *Thompson v. Percival*, 5 B. & Ad. 925; *Sheehy v. Mandeville*, 6 Cranch, 253; *Mason v. Wickersham*, 4 W. & S. 100; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 id. 448, 3 Denio, 410; *Arnold v. Camp*, 12 Johns. 409, 7 Am. Dec. 328; *Lodge v. Dicas*, 3 B. & Ald. 611; *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Russell v. Lytle*, 6 Wend. 390, 22 Am. Dec. 537; *Barron v. Vandvert*, 13 Ala. 232; *Webb v. Goldsmith*, 2 Duer, 413; *Cartwright v. Cooke*, 3 B. & Ad. 701; *Evans v. Powis*, 1 Ex. 601; *Kinsler v. Pope*, 5 Strobb. 126; *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 id. 122; *Lyth v. Ault*, 7 Ex. 669; *Bedford v. Deakin*, 2 Stark. 178. See *Ricketts v. Hall*, 2 Bush, 249; *Keeler v. Salisbury*, 27 Barb. 485, 33 N. Y. 648; *Conkling v. King*, 10 Barb. 372.

In *Bowker v. Harris*, 30 Vt. 425, a wife's note was held sufficient consideration, she having paid it, though it was void when made. See, also, *Kirwan v. Kirwan*, 4 Tyrwh. 491; *Hart v. Alexander*, 2 M. & W. 484; *Powles v. Page*, 3 C. B. 16.

ficient consideration.<sup>1</sup> An accord and satisfaction mov- [429]  
 ing from a stranger, or a person having no pecuniary interest  
 in the subject-matter, if accepted in discharge of the debt, con-  
 stitutes a good defense to an action to enforce the liability  
 against the debtor.<sup>2</sup> He sufficiently adopts it by taking ad-  
 vantage of it by plea.<sup>3</sup> There must be something received to  
 which the creditor was not before entitled.<sup>4</sup> And it must pos-  
 sess some value or by legal possibility be of benefit to him.<sup>5</sup>  
 The extent of the value is not material.<sup>6</sup> Part of a claim may  
 be satisfied by withdrawal of the defense of infancy to the  
 residue.<sup>7</sup> Suspension or abandonment of a suit is a sufficient  
 consideration.<sup>8</sup> If there is a new consideration of some value,  
 it is enough, though it is of much less value than the debt dis-  
 charged.<sup>9</sup> The voluntary acceptance by an injured railroad  
 employee of the benefits provided for in his contract of mem-  
 bership in the relief department maintained by his employer,  
 knowing the effect of such acceptance, bars a suit to recover  
 for the injury sustained.<sup>10</sup> Where a debtor pays part of a debt

<sup>1</sup> *In re Dixon*, 2 McCrary, 556.

<sup>2</sup> *Jones v. Broadhurst*, 9 C. B. 173; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Harrison v. Hicks*, 1 Port. 423, 27 Am. Dec. 638; *Daniel v. Hallenbeck*, 19 Wend. 408; *Clow v. Borst*, 6 Johns. 37; *Stark v. Thompson*, 3 Mon. 296; *Woolfolk v. McDowell*, 9 Dana, 268; *Belshaw v. Bush*, 11 C. B. 191; *Jackson v. Pennsylvania R. Co.*, 66 N. J. L. 319, 49 Atl. Rep. 730; *Armstrong v. School District*, 28 Mo. App. 169.

<sup>3</sup> *Belshaw v. Bush*, *supra*; *Snyder v. Pharo*, 25 Fed. Rep. 398; *Bennett v. Hill*, 14 R. I. 322.

<sup>4</sup> *Thurber v. Sprague*, 17 R. I. 634, 24 Atl. Rep. 48; *Bryant v. Proctor*, 14 B. Mon. 451; *Hethcoate v. Crookshanks*, 2 T. R. 24; *Harper v. Graham*, 20 Ohio, 105; *Good v. Cheesman*, 2 B. & Ad. 328; *Fitch v. Sutton*, 5 East, 230; *Acker v. Phoenix*, 4 Paige, 305; *Commonwealth v. Miller*, 5 Mon. 205; *Riley v. Kershan*, 52 Mo. 224; *Rose v. Hall*, 26 Conn. 392,

68 Am. Dec. 402; *Bartlett v. Rogers*, 3 Sawyer, 62.

<sup>5</sup> *Blinn v. Chester*, 5 Day, 360; *Booth v. Smith*, 3 Wend. 66; *Webster v. Wyser*, 1 Stew. 184; *Keeler v. Neal*, 2 Watts, 424; *Davis v. Noaks*, 3 J. J. Marsh. 494. See § 247; *Foster v. Dawber*, 6 Ex. 839.

<sup>6</sup> *Id.*; *Pinnel's Case*, 5 Rep. 117; *Andrew v. Boughey*, 1 Dyer, 75a.

<sup>7</sup> *Cooper v. Parker*, 15 C. B. 822.

<sup>8</sup> *Smith v. Monteith*, 13 M. & W. 427; *Lewis v. Donohue*, 27 N. Y. Misc. 514, 58 N. Y. Supp. 319.

<sup>9</sup> 1 *Smith's Lead. Cas.* pt. 1, \*445; *Kellogg v. Richards*, 14 Wend. 116; *Jones v. Bullitt*, 2 Litt. 49; *Brooks v. White*, 2 Met. 283; *Harper v. Graham*, 20 Ohio, 105; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Sanders v. Branch Bank*, 13 Ala. 253.

<sup>10</sup> *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 48 N. E. Rep. 496, 38 L. R. A. 756, 64 Ill. App. 444. See § 6.

for which the creditor holds a note, upon an agreement that such part payment shall be full satisfaction, and, in pursuance of such agreement, the note is surrendered or canceled, the transaction will amount to full accord and satisfaction.<sup>1</sup> The surrender is equivalent to a release.<sup>2</sup> If the principal and surety in a bond given to secure the performance of a contract which involves matters uncertain in their nature are insolvent, payment of less than the face of the bond is a good consideration for its discharge.<sup>3</sup> An agreement between grantor and grantee, subsequent to a conveyance, in pursuance of which the former places a sum of money in the hands of a third person to be forfeited to the grantee in full satisfaction of all damage he may sustain by reason of the breach of the former's covenant, is a good accord and satisfaction.<sup>4</sup>

An accord and satisfaction by one of several jointly liable is a discharge of all.<sup>5</sup> At common law an accord and satisfaction to one of two obligees of a common money bond was good because they were considered as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of them of the full amount due to all put an end to the bond.<sup>6</sup> But in equity the general rule with regard to money lent by two persons to a third was that they were *prima facie* regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. "Though they take a joint security, each means to lend his own money and to take back his own."<sup>7</sup> This is, however, but a presumption, and may be rebutted. The accord is good as to the obligee who received his share.<sup>8</sup>

<sup>1</sup> Ellsworth v. Fogg, 35 Vt. 355; Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292; Beach v. Endress, 51 Barb. 570; Kent v. Reynolds, 8 Hun, 559.

<sup>2</sup> Id.

<sup>3</sup> Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. Rep. 414.

<sup>4</sup> Reichel v. Jeffrey, 9 Wash. 250, 37 Pac. Rep. 296.

<sup>5</sup> Chicago v. Babcock, 143 Ill. 358, 32 N. E. Rep. 271; Atwood v. Brown, 72 Iowa, 723, 32 N. W. Rep. 108; Turner v. Hitchcock, 20 Iowa, 310; Metz v. Soule, 40 id. 236; Long v. Long,

57 id. 497, 10 N. W. Rep. 875; Goss v. Ellison, 136 Mass. 503; Coonley v. Wood, 36 Hun, 559.

The discharge of a party not shown to be a wrong-doer will not affect the right of action against the other defendants. Wardell v. McConnell, 25 Neb. 558, 41 N. W. Rep. 548.

<sup>6</sup> Wallace v. Kelsall, 7 M. & W. 264.

<sup>7</sup> Morley v. Bird, 3 Ves. 631; Matson v. Dennis, 10 Jur. (N. S.) 461, 12 Week. Rep. 926.

<sup>8</sup> Steeds v. Steeds, 22 Q. B. Div. 537.

§ 250. **Composition with creditors.** There is no want [430] of consideration in agreements for composition between a debtor and two or more of his creditors; for the engagement of one is a sufficient consideration for that of the others.<sup>1</sup> The fact that a creditor whose claim was disputed was not a party to the agreement does not invalidate it, no such contingency being provided for.<sup>2</sup> When an unliquidated or disputed demand is the subject of accord, and a certain sum is paid and accepted as full satisfaction, the consideration is manifest.

§ 251. **Compromise of disputed claim.** The settlement or compromise of a disputed or doubtful claim is a good consideration for a promise.<sup>3</sup> The claim must be a real one and the parties must regard their rights concerning it as in fact or in law doubtful, and the compromise must be made *bona fide*.<sup>4</sup> A

<sup>1</sup> Pierson v. McCahill, 21 Cal. 122; Fellows v. Stevens, 24 Wend. 292; Steinman v. Magnus, 11 East, 390; Keeler v. Salisbury, 33 N. Y. 648; Way v. Langley, 15 Ohio St. 392; Ricketts v. Hall, 2 Bush, 249; Tuckerman v. Newhall, 17 Mass. 581; Diermeyer v. Hackman, 52 Mo. 282; Reay v. Whyte, 3 Tyrwh. 596; Boyd v. Hind, 1 H. & N. 938; Cutter v. Reynolds, 8 B. Mon. 596; Boothby v. Sowden, 3 Camp. 174; Bradley v. Gregory, 2 id. 383; Wood v. Roberts, 2 Stark. 417; Cockshott v. Bennett, 2 T. R. 765; Hale v. Holmes, 8 Mich. 37; Hartle v. Stahl, 27 Md. 157. See Case v. Gerrish, 15 Pick. 49.

<sup>2</sup> Crawford v. Krueger, 201 Pa. 348, 50 Atl. Rep. 931.

<sup>3</sup> Brockley v. Brockley, 122 Pa. 1, 15 Atl. Rep. 646; Schaben v. Brunning, 74 Iowa, 102, 36 N. W. Rep. 910; Zimmer v. Becker, 66 Wis. 527, 29 N. W. Rep. 228; Stewart v. Ahrenfeldt, 4 Denio, 189; Wehrum v. Kuhn, 61 N. Y. 623; Hammond v. Christie, 5 Robert. 160; United States v. Clyde, 13 Wall. 35; United States v. Child, 12 Wall. 232; United States v. Justice, 14 Wall. 535; Brett v. Universalist Society, 63 Barb. 610.

<sup>4</sup> Wahl v. Barnum, 116 N. Y. 87, 22 N. E. Rep. 280, 5 L. R. A. 623; Zebisch v. Von Minden, 120 N. Y. 406, 24 N. E. Rep. 795; Moon v. Martin, 122 Ind. 211, 23 N. E. Rep. 668; Gilliam v. Alford, 69 Tex. 267, 6 S. W. Rep. 757; Grandin v. Grandin, 49 N. J. L. 508, 60 Am. Rep. 642, 9 Atl. Rep. 756; Cook v. Wright, 1 B. & S. 559; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Ockford v. Barrelli, 20 Week. Rep. 116; Miles v. New Zealand Alford Estate Co., 32 Ch. Div. 266; Demars v. Musser-Sauntry Land Co., 37 Minn. 418, 35 N. W. Rep. 1; Anthony v. Boyd, 15 R. I. 495, 8 Atl. Rep. 701, 10 id. 657; Headley v. Hackley, 50 Mich. 43, 14 N. W. Rep. 693.

In Miles v. New Zealand Alford Estate Co., *supra*, the court dissents from some observations made by Lord Esher, M. R., in Ex parte Banner, 17 Ch. Div. 480, 490, to the effect that it was not only necessary to the validity of a settlement that the plaintiff believed he had a good cause of action, but that the circumstances must in fact raise some doubt whether there was or was not a good cause of action.

mere statement that the amount of a claim was in dispute is not enough to show that there was a consideration for accepting less than was due;<sup>1</sup> but it is sufficient if the controversy be real and the issue respecting it be considered by the parties as doubtful.<sup>2</sup> Whether the compromise amount be received or a promise to pay it, the original claim is extinguished if the parties so agree and there is a sufficient consideration.<sup>3</sup> Inequality of consideration will not, of itself, avoid a settlement.<sup>4</sup> The adjustment of any unliquidated demand, whether in dispute or not, stands on a similar principle.<sup>5</sup> Stated

<sup>1</sup> *Emmitsburg R. Co. v. Donoghue*, 197 Ill. 122, 64 N. E. Rep. 317, 97 67 Md. 383, 1 Am. St. 396, 10 Atl. Ill. App. 442.  
Rep. 233.

It was observed in *Edwards v. Baugh*, 11 M. & W. 641: "The declaration alleges that certain disputes and controversies were pending between the plaintiff and the defendant whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is that the plaintiff claims the debt and the other denies it."

<sup>2</sup> *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. Rep. 495, 47 L. R. A. 417.

As applied to the subject of accord and satisfaction a demand is not liquidated, even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a real difference as to which is the proper amount, the demand is unliquidated. *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. Rep. 715, 51 Am. St. 695.

An account cannot be considered as liquidated so as to prevent the receipt of a less amount than is claimed from being a satisfaction if there is a controversy over a set-off and the amount of the balance. *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. Rep. 1089. See *Bingham v. Brown-*

*ing*, 197 Ill. 122, 64 N. E. Rep. 317, 97 Ill. App. 442.

<sup>3</sup> *Wilder v. St. Johnsbury, etc. R. Co.*, 65 Vt. 43, 25 Atl. Rep. 896; *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. Rep. 756, 60 Am. Rep. 642; *Korne v. Korne*, 30 W. Va. 1; *Tuttle v. Tuttle*, 12 Met. 551, 46 Am. Dec. 701; *Peace v. Stennet*, 4 J. J. Marsh. 449; *Jones v. Bullitt*, 2 Litt. 49; *Reid v. Hibbard*, 6 Wis. 175; *Pulling v. Supervisors*, 3 Wis. 337; *Calkins v. State*, 13 Wis. 389; *Metz v. Soule*, 40 Iowa, 236; *Ogborn v. Hoffman*, 52 Ind. 439; *Riley v. Kershan*, 52 Mo. 224; *Merry v. Allen*, 39 Iowa, 235; *Gates v. Shutts*, 7 Mich. 127; *Converse v. Blumrich*, 14 id. 109, 90 Am. Dec. 230; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Hooper v. Hooper*, 26 id. 435; *Bowen v. Lockwood*, id. 441; *Hull v. Swarthout*, 29 id. 249; *Campbell v. Skinner*, 30 id. 32; *Reithmaier v. Beckwith*, 35 id. 100; *Neary v. Bostwick*, 2 Hilt. 514.

<sup>4</sup> *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. Rep. 495, 47 L. R. A. 417.

<sup>5</sup> *Sanford v. Abrams*, 24 Fla. 181, 2 So. Rep. 373; *Donohue v. Woodbury*, 6 Cush. 148, 52 Am. Dec. 777; *Bateman v. Daniels*, 5 Blackf. 71; *Harris v. Story*, 2 E. D. Smith, 363; *Longridge v. Dorville*, 5 B. & Ald. 117; *Watters v. Smith*, 2 B. & Ad. 889; *Haigh v. Brooks*, 10 A. & E. 309; *Wilkinson v. Byers*, 1 id. 106; *Wright v. Acres*, 6 id. 726; *Atlee v. Back-*



accounts and settlements are treated with favor, and are conclusive unless there is proof of mistake or fraud.<sup>1</sup> A definite sum paid or agreed to be paid, and adopted by the parties as an adjustment and compensation for either a doubtful and disputed demand, or one which is uncertain and unliquidated, constitutes a sufficient consideration for the discharge of such original demand. And upon such adjustment, by which a definite sum, paid or to be paid, is substituted for the claim as it formerly existed, the latter is extinguished on the principle of accord and satisfaction.<sup>2</sup> An infant's action for damages is barred by the acceptance, in full satisfaction from the party liable therefor, of a sum of money which is undisposed of and not returned, notwithstanding an offer to credit it on any judgment that might be obtained.<sup>3</sup> If a receipt for money paid contains anything in the nature of an agreement upon the compromise or settlement of a disputed claim that the payee accepts and receives the sum designated in it in satisfaction and discharge of his claim, it is a contract and cannot be varied or contradicted by parol.<sup>4</sup>

Where money is due and there is an agreement to accept something else in lieu of it, and that something else is delivered and accepted, the agreement cannot be said to be without consideration, though the thing so delivered and accepted is of less value than the nominal amount of the debt. Anything

house, 3 M. & W. 633; *Sibree v. Tripp*, 15 id. 23; *Llewellyn v. Llewellyn*, 3 Dowl. & L. 318; *Allis v. Billing*, 2 Cush. 19; *Durham v. Wadlington*, 2 Strobb. Eq. 258; *Abbott v. Wilmot*, 22 Vt. 437; *Ellis v. Bitzer*, 2 Ohio, 295.

<sup>1</sup> Id.; *Wilde v. Jenkins*, 4 Paige, 481; *Lockwood v. Thorne*, 11 N. Y. 170; *Pulliam v. Booth*, 21 Ark. 420. See *Purtel v. Morehead*, 2 Dev. & Bat. 239; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. Rep. 495, 47 L. R. A. 417.

<sup>2</sup> *Storch v. Dewey*, 57 Kan. 370, 46 Pac. Rep. 698; *Maack v. Schneider*, 51 Mo. App. 92; *Lapp v. Smith*, 183 Ill. 179, 55 N. E. Rep. 717; *Home F. Ins. Co. v. Bredehoft*, 49 Neb. 152, 68 N. W. Rep. 400; *Bingham v. Brown-*

*ing*, 197 Ill. 122, 64 N. E. Rep. 317; *Housatonic Nat. Bank v. Foster*, 85 Hun, 376, 32 N. Y. Supp. 1031.

The satisfaction of a cause of action for personal injury made by the person injured bars his representatives after his death from asserting any claim because of the act of negligence for which satisfaction was made. *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 355; *Dibble v. New York & E. R. Co.*, 25 Barb. 183.

<sup>3</sup> *Lane v. Dayton, etc. Co.*, 161 Tenn. 581, 48 S. W. Rep. 1094.

<sup>4</sup> *Komp v. Raymond*, 42 App. Div. 32, 58 N. Y. Supp. 909; *Coon v. Knapp*, 8 N. Y. 402, 59 Am. Dec. 502; *Ryan v. Ward*, 48 N. Y. 204.

of legal value, whether a chose in possession or in action, actually received in full satisfaction of a debt is good for that effect.<sup>1</sup> Nor is the adequacy of the consideration affected because the value of the collateral thing received in satisfaction was fixed by agreement of the parties at a less sum than the amount of the debt. Thus, where a larger sum than \$750 was owing and actually due in money, an agreement to receive \$750 worth of salt and the actual reception of it in discharge of the whole debt was held to have that effect.<sup>2</sup> The right to compromise a suit may be exercised by the person who is authorized to bring it in the first instance,<sup>3</sup> and a compromise made by one plaintiff will bind his co-plaintiffs if it appears that the amount paid was received as full satisfaction for the whole injury.<sup>4</sup> Where a statute gives the widow the prior right to sue for the death of her husband, she has the right to compromise her suit over the objections of her children, and without let or hindrance from any one.<sup>5</sup> She may also compromise the whole right of action before suit is brought, and a payment to her of the sum agreed upon will discharge the wrong-doer.<sup>6</sup> But if the suit is brought by an administrator on behalf of the widow and children she cannot compromise without the plaintiff's consent or the concurrence of the other beneficiaries.<sup>7</sup>

<sup>1</sup> 1 Smith's Lead. Cases, pt. 1, 445; Jones v. Bullitt, 2 Litt. 49; Brooks v. White, 2 Met. 283, 37 Am. Dec. 95; New York State Bank v. Fletcher, 5 Wend. 85; Frisbie v. Larned, 21 id. 451; Bullen v. McGillicuddy, 2 Dana, 90; Pope v. Tunstall, 2 Ark. 209; Booth v. Smith, 3 Wend. 66; Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247; Le Page v. McCrea, 1 Wend. 164; Sanders v. Branch Bank, 13 Ala. 353; Blinn v. Chester, 5 Day, 359; Watkinson v. Inglesby, 5 Johns. 386; Eaton v. Lincoln, 13 Mass. 424; Musgrove v. Gibbs, 1 Dall. 216; Arnold v. Post, 8 Bush, 3; Churchill v. Bowman, 39 Vt. 518; Gavin v. Annan, 2 Cal. 494.

<sup>2</sup> Jones v. Bullitt, 2 Litt. 49; Woolfolk v. McDowell, 9 Dana, 263; Gaffney v. Chapman, 4 Robert. 275. But see Howard v. Norton, 65 Barb. 161.

In *Platts v. Walrath, Hill & Denio*, 59, it was held that giving a mortgage for a debt, less a certain deduction agreed to be made in consideration of the security, is not payment of the debt so that a note subsequently given for the sum deducted will be deemed without consideration.

<sup>3</sup> *Stephens v. Nashville, etc. R.*, 10 Lea. 448.

<sup>4</sup> *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. Rep. 927; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. Rep. 518.

<sup>5</sup> *Webb v. Railway Co.*, 88 Tenn. 119, 12 S. W. Rep. 428.

<sup>6</sup> *Holder v. Railroad*, 92 Tenn. 141, 20 S. W. Rep. 537, 36 Am. St. 77.

<sup>7</sup> *Railroad v. Acuff*, 92 Tenn. 26, 20 S. W. Rep. 348.

§ 252. **Agreement must be executed.** The agreement [432] or accord must be executed.<sup>1</sup> But if the agreed satisfaction consists of an agreement rather than the performance of it, the accord is executed when the agreement which is the consideration of the discharge is entered into, whether it is ever performed or not.<sup>2</sup> Formerly to an action on a bond, accord and satisfaction could be pleaded by deed only, for an obligation under seal could not be discharged but by an instrument of equal dignity.<sup>3</sup> But this rule is not now followed if there has been actual performance.<sup>4</sup>

§ 252a. **Rescission or exoneration before breach.** Rescission of an executory contract, or exoneration before breach, is not accord and satisfaction.<sup>5</sup> After breach, however, when the demand becomes due for damages, whatever may be the

<sup>1</sup> Hearn v. Kiefe, 38 Pa. 147, 80 Am. Dec. 472; Green v. Lancaster County, 61 Neb. 473, 85 N. W. Rep. 439; Williams v. Stanton, 1 Root, 426; Pope v. Tunstall, 2 Ark. 209; Hall v. Smith, 10 Iowa, 48; Flack v. Garland, 8 Md. 191; Woodward v. Miles, 24 N. H. 289; Coit v. Houston, 3 Johns. Cas. 243; Watkinson v. Inglesby, 5 Johns. 386; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 569; Peytoe's Case, 9 Co. 79; Walker v. Seaborne, 1 Taunt. 526; Fitch v. Sutton, 5 East, 230; Tuckerman v. Newhall, 17 Mass. 581; Spruneberger v. Dentler, 4 Watts, 126; Rising v. Patterson, 5 Whart. 316; Daniels v. Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Bayley v. Homan, 3 Bing. N. C. 915; Allies v. Probyn, 5 Tyrwh. 1079; Edwards v. Chapman, 1 M. & W. 231; Collingbourne v. Mantell, 5 id. 292; Gabriel v. Dresser, 15 C. B. 622; Brown v. Perkins, 1 Hare, 564; Holton v. Noble, 83 Cal. 7, 23 Pac. Rep. 58; Gulf, etc. R. Co. v. Gordon, 70 Tex. 80, 7 S. W. Rep. 695; Burgess v. Denison Paper Manuf. Co., 79 Me. 266, 9 Atl. Rep. 726; Sanford v. Abrams, 24 Fla. 181, 2 So. Rep. 373; Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. Rep. 476; Johnson v. Hunt, 81

Ky. 321; Schlitz v. Meyer, 61 Wis. 418, 21 N. W. Rep. 243; Fink v. Joseph, 2 New Mex. 138. See § 246.

<sup>2</sup> Woodward v. Miles, 24 N. H. 289; Watkinson v. Inglesby, 5 Johns. 386; Eaton v. Lincoln, 13 Mass. 424; Seaman v. Haskins, 2 Johns. Cas. 195; Heaton v. Angier, 7 N. H. 397, 28 Am. Dec. 353; Good v. Cheesman, 2 B. & Ad. 323; Reeves v. Hearne, 1 M. & W. 323; Buttigieg v. Booker, 9 C. B. 689; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; McCreery v. Day, 119 N. Y. 1, 16 Am. St. 793, 23 N. E. Rep. 198, 6 L. R. A. 503; Bennett v. Hill, 14 R. I. 432.

<sup>3</sup> Levy v. Very, 12 Ark. 148; Ligon v. Dunn, 6 Ired. 133.

<sup>4</sup> McCreery v. Day, *supra*; Capital City Mutual F. Ins. Co. v. Detwiler, 23 Ill. App. 656; Hastings v. Lovejoy, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. Rep. 776.

<sup>5</sup> Barelli v. O'Conner, 6 Ala. 617. It is said to be a general rule that a simple contract may, before breach, be waived or discharged without deed and without consideration; but after breach there can be no discharge except by deed or upon sufficient consideration. Byles on Bills, 138. See Foster v. Dawber, 6 Ex. 838; Dobson v. Espei, 2 H. & N. 79.

[433] grade of the contract which is broken, it may be satisfied by matter *in pais*, and is subject to the defense of accord and satisfaction. That is a good defense to an action for breach of covenant.<sup>1</sup> And the modern doctrine is that it is good to an action on a judgment.<sup>2</sup>

## SECTION 4.

### RELEASE.

§ 253. **Definition.** A release of a chose in action is an immediate technical discharge of it by deed.<sup>3</sup> It operates directly upon the demand to extinguish it, and must be pleaded

This is doubtless true of contracts mutually executory. In such contracts mutual waiver is a rescission. See 1 Smith's Lead. Cas. \*465. If the consideration be executed on one side, the executory obligation of the other party founded thereon cannot be waived without consideration, or such act of renunciation as would amount to a release, unless it has been acted upon. See upon this general subject, *Blood v. Enos*, 12 Vt. 625; *Johnson v. Reed*, 9 Mass. 78, 6 Am. Dec. 36; *Rogers v. Atkinson*, 1 Ga. 12; *Richardson v. Cooper*, 25 Me. 450; *Cuff v. Penn*, 1 M. & S. 21; *Goss v. Nugent*, 5 B. & Ad. 58; *Cummings v. Arnold*, 3 Met. 486, 37 Am. Dec. 155; *Weld v. Nichols*, 17 Pick. 538; *Ward v. Walton*, 4 Ind. 75; *Low v. Forbes*, 18 Ill. 568; *Crowley v. Vitty*, 7 Ex. 322; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Payne v. New South Wales Coal Co.*, 10 Ex. 291; *Kellogg v. Olmsted*, 28 Barb. 96; *Hunt v. Barfield*, 19 Ala. 117; *Thurston v. Ludwig*, 6 Ohio St. 1; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 127; *McKee v. Miller*, 4 Blackf. 222; *Harrison v. Close*, 2 Johns. 448, 3 Am. Dec. 444; *Sard v. Rhodes*, 1 M. & W. 155; *Crawford v. Millspaugh*, 13 Johns. 87; *Seymour v. Minturn*, 17 id. 169, 8 Am. Dec. 380; *Foster v. Dawber*, 6 Ex. 839;

*King v. Gillett*, 7 M. & W. 55; *Langden v. Stokes*, Cro. Car. 383.

The technical distinction between a satisfaction before or after the breach is disregarded, and a new parol agreement followed by its actual performance, whether made or executed before or after the breach, is a good accord and satisfaction of a covenant. *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. 793, 23 N. E. Rep. 198, 6 L. R. A. 503, and cases cited; *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 463, 2 N. E. Rep. 776.

<sup>1</sup> *Payne v. Barnet*, 2 A. K. Marsh. 312; *Strang v. Holmes*, 7 Cow. 224; *Keeler v. Salisbury*, 33 N. Y. 648; *United States v. Howell*, 4 Wash. C. C. 620.

<sup>2</sup> *Savage v. Everman*, 70 Pa. 315, 10 Am. Rep. 676; *Jones v. Ransom*, 3 Ind. 327; *Reid v. Hibbard*, 6 Wis. 175; *Farmers' Bank v. Groves*, 12 How. 51; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Campbell v. Booth*, 8 Md. 107; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Brown v. Feeter*, 7 Wend. 301; *Evans v. Wells*, 22 id. 324, 341; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Witherby v. Mann*, 11 Johns. 518; *Baum v. Buntyn*, 62 Miss. 10.

<sup>3</sup> A parol release of a money judg-

as a release.<sup>1</sup> But a release implies a consideration, and therefore the demand is inferentially satisfied.<sup>2</sup> The cancelment of a released demand, however, is not the consequence of the supposed satisfaction, but the direct effect of the release. The release is not merely evidence of the extinguishment, but is itself the extinguisher.<sup>3</sup> Though it recites only a nominal consideration,<sup>4</sup> or, under statutes allowing the consideration of sealed instruments to be inquired into, it is proved [434] to be only nominal, the release will still operate to extinguish the claim to which it relates.<sup>5</sup> An agreement by one of several defendants not to defend a suit supports a release as to him.<sup>6</sup> A release is binding notwithstanding the party released does not keep his promise to give the other employment, that being part of the consideration for the release;<sup>7</sup> and so if the contract re-employing an injured servant does not fix the time the employment shall continue, the fault being his, and he is discharged.<sup>8</sup> If there are two debts in existence, established and known, the payment of one is not a consideration for the release of the other.<sup>9</sup>

**§ 254. Differs from accord and satisfaction.** A seal is not necessary to render a release and discharge of a liability ef-

ment in consideration of the receipt of a less sum than it calls for is invalid, though the release be indorsed upon the execution issued in the original action. *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274.

Voluntary declarations by a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will not operate as an equitable release. *Irwin v. Johnson*, 36 N. J. Eq. 347, overruling *Leddell v. Starr*, 20 id. 274.

<sup>1</sup> *Corbett v. Lucas*, 4 McCord, 323.

<sup>2</sup> *Warner v. Durham, Hill & Denio*, 206; *Matthews v. Chicopee Manuf. Co.*, 3 Robert. 711; *McAllester v. Sprague*, 34 Me. 296.

<sup>3</sup> *McCrea v. Purmort*, 16 Wend. 460, 474.

<sup>4</sup> *Wilt v. Franklin*, 1 Bin. 502, 2 Am. Dec. 474; *Morse v. Shattuck*, 4

N. H. 229, 17 Am. Dec. 419; *Gully v. Grubbs*, 1 J. J. Marsh. 387; *Maclary v. Reznor*, 3 Del. Ch. 445.

<sup>5</sup> *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 48 N. E. Rep. 496; *Stearns v. Tappen*, 5 Duer, 294. See *Davis v. Bowker*, 2 Nev. 487; *Green v. Langdon*, 28 Mich. 222.

A cause of action may be released upon a consideration coming from a third person. *Compton v. Elliott*, 48 N. Y. Super. Ct. 211.

<sup>6</sup> *McClung v. Mabry*, 2 Tenn. Cas. 91.

<sup>7</sup> *Szymanski v. Chapman*, 45 App. Div. 369, 61 N. Y. Supp. 310.

<sup>8</sup> *Texas Midland R. v. Sullivan*, 20 Tex. Civ. App. 50, 48 S. W. Rep. 598; *East Line, etc. R. Co. v. Scott*, 72 Tex. 70, 10 S. W. Rep. 99, 13 Am. St. 753.

<sup>9</sup> *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 580, 12 Sup. Ct. Rep. 84.

fectual if the agreement embraces the demand and is upon a sufficient consideration. It can operate to extinguish the demand by way of accord and satisfaction,<sup>1</sup> and in this form a debtor may avail himself of a release made by an agent in his own name.<sup>2</sup> A mere receipt may have such an effect; but it is only *prima facie* evidence of payment.<sup>3</sup> In Connecticut a receipt approximates in its effect to a release.<sup>4</sup> The general rule, however, is that a mere receipt is but evidence of the payment which it states, and is open to contradiction.<sup>5</sup> A release not under seal, and without consideration, is void.<sup>6</sup> Nor will equity compel a creditor to affix a seal to a release not founded on a consideration, even upon an averment that the seal was omitted by mistake.<sup>7</sup>

§ 255. **Extrinsic evidence and construction.** Extrinsic proof is not allowed to restrict a release of all demands, by showing it was not intended to cover particular ones within its terms;<sup>8</sup> but according to some authorities this rule is operative only between the parties to the contract, and a joint tort-feasor is not a party to a release given his co-wrongdoer, and may contradict it by parol evidence.<sup>9</sup> The weight of authority seems

<sup>1</sup> Farmers' Bank v. Blair, 44 Barb. 641; Corbett v. Lucas, 4 McCord, 323; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Lewiston v. Junction R. Co., 7 Ind. 597.

<sup>2</sup> Evans v. Wells, 22 Wend. 324.

<sup>3</sup> Thompson v. Fausate, 1 Pet. C. C. 182; Maze v. Miller, 1 Wash. C. C. 328.

<sup>4</sup> Hurd v. Blackman, 19 Conn. 177; Bishop v. Perkins, id. 300; Tucker v. Baldwin, 13 id. 136, 33 Am. Dec. 384; Bonnell v. Chamberlin, 26 Conn. 487.

<sup>5</sup> Danziger v. Hoyt, 46 Hun, 270; Coon v. Knap, *supra*; Egleston v. Knickerbacker, 6 Barb. 458; Houston v. Shindler, 11 id. 36; White v. Parker, 8 id. 48; Thompson v. Maxwell, 74 Iowa, 415, 38 N. W. Rep. 125; Grant v. Frost, 80 Me. 202, 13 Atl. Rep. 881; Hart v. Gould, 62 Mich. 262, 28 N. W. Rep. 831; Elsbarg v. Myrman, 41 Minn. 541, 43 N. W. Rep. 572; McFadden v. Missouri Pacific R. Co., 92 Mo. 343, 4 S. W. Rep. 208,

1 Am. St. 721; Shoemaker v. Stiles, 102 Pa. 549; Bulwinkle v. Cramer, 27 S. C. 376, 3 S. E. Rep. 776, 13 Am. St. 645; Hill v. Durand, 58 Wis. 160, 15 N. W. Rep. 390; 2 Jones on Evidence, § 502 *et seq.*

<sup>6</sup> Crawford v. Millspaugh, 13 Johns. 87; Seymour v. Minturn, 17 id. 169, 8 Am. Dec. 380; Dewey v. Derby, 20 Johns. 462; Barnard v. Darling, 11 Wend. 28.

<sup>7</sup> Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

<sup>8</sup> Green v. Chicago, etc. R. Co., 35 C. C. A. 68, 92 Fed. Rep. 873; Denver, etc. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. Rep. 501; Deland v. Amesbury Manuf. Co., 7 Pick. 244; West Boylston Manuf. Co. v. Searle, 15 id. 225; Rice v. Woods, 21 id. 30. See Van Brunt v. Van Brunt, 3 Edw. Ch. 14; Hoes v. Van Hoesen, 1 Barb. Ch. 379.

<sup>9</sup> O'Shea v. New York, etc. R. Co., 44 C. C. A. 601, 105 Fed. Rep. 559.

to be against the exception to the general rule.<sup>1</sup> A release may extinguish a particular demand, although it was not in the minds of the parties at the time of its execution. It will be held to embrace demands which are within its terms, whether contemplated or not.<sup>2</sup> But under a statute to [435] the effect that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with his debtor, a release does not extend to claims of which the debtor was ignorant through his ignorance of law.<sup>3</sup> In construing releases, however, general words, and even those the most comprehensive, may be limited to particular demands, where it appears by the consideration, the recitals and the nature and circumstances of the demands, to one or more of which it is proposed to apply the release, that such restriction was intended by the parties.<sup>4</sup> And even where the word "release" is used, and the instrument is under seal, if it be apparent from the whole of it and the circumstances of the case that the parties did not intend a release, such intention as may appear will prevail, and the instrument may be construed simply as an agreement not to charge the person to whom it is executed.<sup>5</sup> Where the release for personal injuries specified the injuries and expressed that it also covered all manner of actions, causes of action, claims and demands whatever from the beginning of the world to this day, the particular recital was a qualification of the

<sup>1</sup> *Brown v. Cambridge*, 3 Allen, 474; *Goss v. Ellison*, 136 Mass. 503; *Denver, etc. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. Rep. 501.

<sup>2</sup> *Hyde v. Baldwin*, 17 Pick. 307.

<sup>3</sup> *Rued v. Cooper*, 119 Cal. 463, 51 Pac. Rep. 204.

<sup>4</sup> *Jeffreys v. Southern R. Co.*, 127 N. C. 377, 37 S. E. Rep. 515; *Rich v. Lord*, 18 Pick. 322.

A release will be construed from the standpoint occupied by the parties to it when it was executed; in order to do this extrinsic evidence is admissible to show the circumstances then existing, and the nature of the transaction. The words used must

not be added to or taken from. *Rowe v. Rand*, 111 Ind. 206, 12 N. E. Rep. 377. If only general words are used the instrument will be construed most strongly against its maker. *Ibid.*

A release will not be given retroactive effect unless its terms require it. *Hughson v. Richmond & D. R. Co.*, 2 D. C. App. Cas. 98.

<sup>5</sup> *Solly v. Forbes*, 2 Brod. & Bing. 46; 1 Par on Cont. 28. See *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *McIntyre v. Williamson*, 1 Edw. 34; *Kirby v. Turner*, Hopk. 309; *Matthews v. Chicopee Manuf. Co.*, 3 Robert. 711.

general words, and these were limited by the specific recital of the injuries that the payment was made to cover; hence an injury unknown to both parties when the release was made was not included in it.<sup>1</sup> A release of all claims for damages by reason of the construction of a railroad upon the lands of the releasor cuts off his right and any right of his lessee or grantee to recover for injuries resulting from the careful and skilful construction of the road, and carries with it to the company the right to do all incidental acts essential to the enjoyment of the right granted;<sup>2</sup> and an agreement on the part of the landowner to sell a railroad company a right of way across his land covers all damages for which the vendor is entitled to compensation,<sup>3</sup> unless they result from negligence and occur after the release is given.<sup>4</sup> A covenant to discontinue a pending action at law and to release all claim or right of action for present or future damages arising from a specified cause bars all judicial proceedings for that cause—a suit for an injunction as well as an action for damages.<sup>5</sup> In determining the scope to be given a release the consideration for it will have great influence; if that is nominal or small as compared with the rights surrendered, and the generality of the language used indicates that it affects rights of which the party who executed it was ignorant, equity will restrict its effect to that intended.<sup>6</sup> The obligation imposed upon a railroad company to fence its road cannot be got rid of by any release it may obtain from the owner of the land over which the road is constructed.<sup>7</sup>

<sup>1</sup> *Union Pacific R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. Rep. 365, 23 L. R. A. 581; *Lumley v. Wabash R. Co.*, 22 C. C. A. 60, 76 Fed. Rep. 66. See *McCarty v. Houston, etc. R. Co.*, 21 Tex. Civ. App. 568, 54 S. W. Rep. 421.

<sup>2</sup> *Denver U. & P. R. Co. v. Barsaloux*, 15 Colo. 297, 25 Pac. Rep. 165; *Burrow v. Terre Haute & L. R. Co.*, 107 Ind. 432, 8 N. E. Rep. 167; *Hoffeditz v. Railroad Co.*, 129 Pa. 264, 18 Atl. Rep. 125; *Updegrove v. Pennsylvania, etc. R. Co.*, 132 Pa. 540, 19 Atl. Rep. 283, 7 L. R. A. 213. Compare *St. Louis, etc. R. Co. v. Hurst*, 25 Ill. App. 98.

<sup>3</sup> *Kemp v. Pennsylvania R.*, 156 Pa. 430, 26 Atl. Rep. 1074.

<sup>4</sup> *Brown v. Pine Creek R. Co.*, 183 Pa. 38, 38 Atl. Rep. 401; *Missouri, etc. R. Co. v. Hopson*, 15 Tex. Civ. App. 126, 39 S. W. Rep. 384. See § 1090.

<sup>5</sup> *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 411, 43 Am. Rep. 607.

<sup>6</sup> *Blair v. Chicago & A. R. Co.*, 89 Mo. 383; *Lusted v. Chicago & N. R. Co.*, 71 Wis. 391, 36 N. W. Rep. 857; *Kirchner v. New Home Sewing Machine Co.*, 59 Hun, 186, 13 N. Y. Supp. 473.

<sup>7</sup> *Cincinnati, etc. R. Co. v. Hildreth*, 77 Ind. 504.



§ 256. **Who may execute.** A release will be effectual to discharge a debt or liability within its terms, although it is not executed by all in whom the right of action is vested, and though it is to only one of several persons jointly liable. Where several must join as plaintiffs in bringing an action a release of the cause of action by one of them is a bar.<sup>1</sup> One partner may, without being specially authorized thereto, bind his firm by a sealed release of a partnership claim.<sup>2</sup> The right to execute a release cannot be exercised to the detriment of third persons. If a grantee by a covenant in a deed has assumed the payment of a mortgage upon the premises, the grantor cannot, after the mortgagee has accepted the grantee as his security, and without the mortgagee's assent, release the grantee.<sup>3</sup> The person who is entitled to the damages resulting from the death of another may release the right of action therefor.<sup>4</sup> If a ward, after attaining majority, makes a settlement with his guardian without the intervention of the court, and after having received the amount agreed to be coming to him gives a release to the guardian, he cannot thereafter trouble either court or guardian unless he shows that he has been prejudiced by the guardian's fraud.<sup>5</sup>

§ 257. **Effect when executed by or to one of several claiming or liable.** One of several joint creditors may receive payment or satisfaction and discharge the entire obligation, and the others will be bound.<sup>6</sup> But the case must be free

<sup>1</sup> *Osborn v. Martha's Vineyard R. Co.*, 140 Mass. 549, 5 N. E. Rep. 486; *Pattison v. Skillman*, 43 N. J. Eq. 392, 13 Atl. Rep. 808; *Wallace v. Kelsall*, 7 M. & W. 264; *Clark v. Dinsmore*, 5 N. H. 136; *Kimball v. Wilson*, 3 id. 96, 14 Am. Dec. 342; *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. 479; *Sherman v. Ballou*, 8 Cow. 304; *Pierson v. Hooker*, 3 Johns. 68, 3 Am. Dec. 467; *Napier v. McLeod*, 9 Wend. 120; *Bulkley v. Dayton*, 14 Johns. 387; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537. See *Gram v. Cadwell*, 5 Cow. 489; *Bruen v. Marquand*, 17 Johns. 58; *Halsey v. Fairbanks*, 4

*Mason*, 206; *Wiggin v. Tudor*, 23 Pick. 434; *Wilkinson v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

<sup>2</sup> *Allen v. Cheever*, 61 N. H. 32.

<sup>3</sup> *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. 508, 22 N. E. Rep. 756, 6 L. R. A. 610.

<sup>4</sup> *Stuebing v. Marshall*, 10 Daly, 406. See § 6.

<sup>5</sup> *Luken's Appeal*, 7 W. & S. 48; *Alexander's Estate*, 156 Pa. 368, 27 Atl. Rep. 18.

<sup>6</sup> *Hall v. Gray*, 54 Me. 230; *Pierson v. Hooker*, 3 Johns. 68, 3 Am. Dec. 467; *Kimball v. Wilson*, 3 N. H. 96, 14 Am. Dec. 342; *Lumbermen's Ins. Co. v. Preble*, 50 Ill. 332.

[436] from fraud on the co-creditors who do not join.<sup>1</sup> Where, however, the release on its face purports to be a satisfaction of only the portion of the debt or claim belonging to the party executing it, it will have effect only to that extent. The demand will then be deemed severed with the debtor's consent, and a separate action may be brought for the residue by the creditors entitled thereto.<sup>2</sup> And such is the effect of a general release by one of two plaintiffs of all actions, debts, claims and demands which the plaintiff has against the defendant.<sup>3</sup> A release by the nominal creditor is not good against, but a fraud on, the real party in interest. If the party taking it and seeking to avail himself of it was aware that the releasor had no interest in the demand released, the instrument will be disregarded.<sup>4</sup>

<sup>1</sup> *Id.* In *Upjohn v. Ewing*, 2 Ohio St. 13, it was held that one or less than all of several joint creditors, between whom no partnership exists, cannot release the common debtor, so as to conclude the co-creditors who do not assent to such release. Though they may thus defeat an action at law, in which all the joint creditors must join, it does not follow that a recovery in equity, where no such joinder is necessary, may not be had. See *Emerson v. Baylies*, 19 Pick. 55; 3 Par. on Cont. 617 and note.

<sup>2</sup> In *Holland v. Weld*, 4 Me. 255, there was a contract by one with four persons that he would clear certain obstructions from a river. Afterwards one of the four executed to him a release from all liability to such party, making the release for any damage sustained in consequence of any past or future non-performance. Mellen, C. J., said: "This release, in its terms, discharges Weld from his liabilities to Austin only, for any damage sustained by him. To give it any more broad and extensive operation would be contrary to the expressed intention of both of the parties. According to *Cole v. Knight*, 3 Mod. 277, and *Ly-*

*man v. Clark*, 9 Mass. 235, a release should be confined to the object which was in view, and on which it was plainly the intention of all that it should operate. The contract was originally joint; and had no release been given by Austin, an action must necessarily have been brought in the name of all the four against the defendant; but as he has accepted the release, and availed himself of it so far as he was once liable to Austin, he has by this act converted the joint contract into a several one; and he must now permit the plaintiff and the other two promisees to consider the contract in that light, and assert their claims against him accordingly. This course is manifestly just and sanctioned by settled principles." *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162; *Carrington v. Crocker*, 37 N. Y. 336; *Parmalee v. Lawrence*, 44 Ill. 405.

<sup>3</sup> *Crafts v. Sweeney*, 18 R. I. 730, 30 Atl. Rep. 658; *Boston & M. R. v. Portland, etc. R. Co.*, 119 Mass. 498, 20 Am. Rep. 338.

<sup>4</sup> *Gram v. Cadwell*, 5 Cow. 489; *Legh v. Legh*, 1 Bos. & P. 447; 1 Par. on Cont. 27; 2 *id.* 617, and note; *Timan v. Leland*, 5 Hill, 237.

A surety paying the debt may be

A release of one of several joint or joint and several debtors or wrong-doers discharges all. The deed is taken most strongly against the releasor, and is conclusive evidence that he has been satisfied.<sup>1</sup> This rule applies to wrong-doers though there was no concert of action among them, if the injury was single;<sup>2</sup> and the effect is the same in some jurisdictions, though a claim is made against one who was not in fact liable, if he has given a consideration for a release.<sup>3</sup> But

subrogated notwithstanding a legal release of it; and an intention to be subrogated will be presumed from the mere act of paying. *Neilson v. Fry*, 16 Ohio St. 552; *Dempsey v. Bush*, 18 id. 376.

<sup>1</sup> *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. 475, 14 N. E. Rep. 534 (the words used were "in full satisfaction for his liability"); *McClung v. Mabry*, 2 Tenn. Cas. 91; *O'Shea v. New York, etc. R. Co.*, 44 C. C. A. 601, 105 Fed. Rep. 559; *Denver, etc. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. Rep. 501; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. Rep. 1091; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. Rep. 1099; *De-long v. Curtis*, 35 Hun. 94; *Urton v. Price*, 57 Cal. 270; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. Rep. 518, 36 Am. Rep. 830; *Lamb v. Gregory*, 12 Neb. 506, 11 N. W. Rep. 755 (joint judgment debtors); *Chapin v. C. & E. I. R. Co.*, 18 Ill. App. 47; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *Coke Litt.* 232; *Bac. Abr.*, Release, 9; *Bronson v. Fitzhugh*, 1 Hill, 185; *Rowley v. Stoddard*, 7 Johns. 207; *Catskill Bank v. Messenger*, 9 Cow. 37; *Hoffman v. Dunlop*, 1 Barb. 185; *Parsons v. Hughes*, 9 Paige, 591; *Ward v. Johnson*, 13 Mass. 148; *Tuckerman v. Newhall*, 17 id. 581; *Wiggin v. Tudor*, 23 Pick. 434; *Houston v. Darling*, 16 Me. 413; *Ruble v. Turner*, 2 Hen. & M. 39; *Cornell v. Masten*, 35 Barb. 157; *Matthews v. Chicopee Manuf. Co.*, 3 Robert. 711; *Mottram v. Mills*, 2 Sandf. 189; *Bloss v. Plymale*,

3 W. Va. 393, 100 Am. Dec. 752; *Brown v. Marsh*, 7 Vt. 320; *Armstrong v. Hayward*, 6 Cal. 183; *Frink v. Green*, 5 Barb. 455; *Rice v. Webster*, 18 Ill. 321; *Prince v. Lynch*, 38 Cal. 528; *Hunt v. Terril's Heirs*, 7 Marsh. 68; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Lacey v. Kinaston*, 1 Ld. Raym. 688, 12 Mod. 551; *Johnson v. Collins*, 20 Ala. 435; *McAllister v. Denin*, 27 Mo. 40. See as to the effect of a release to one of two joint tortfeasors under the statute of Kansas, *Hager v. McDonald*, 65 Fed. Rep. 200.

<sup>2</sup> *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Brown v. Cambridge*, 3 Allen, 474; *Goss v. Ellison*, 136 Mass. 503; *Aldrich v. Parnell*, 147 id. 409, 18 N. E. Rep. 170; *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 4 L. R. A. 54, 17 Atl. Rep. 338; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163, 4 Pac. Rep. 1165.

<sup>3</sup> *Leddy v. Barney*, 139 Mass. 394; *Seither v. Philadelphia Traction Co.*, *Tompkins v. Clay Street R. Co.*, *supra*; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. Rep. 1091; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. Rep. 344. *Contra*, *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. Rep. 548; *Missouri, etc. R. Co. v. McWhorter*, 59 Kan. 345, 53 Pac. Rep. 135, citing *Bloss v. Plymale*, 3 W. Va. 393; *Wilson v. Reed*, 3 Johns. 175; *Snow v. Chandler*, 10 N. H. 92; *Bell v. Perry*, 43 Iowa, 368; *Owen v. Brockschmidt*, 54 Mo. 285; *Pogel v. Meilke*, 60 Wis.

if a release is given without the payment of any part of the damages sustained to one who is not a joint wrong-doer it will not necessarily release another who may have had some connection with the wrong.<sup>1</sup> A release is to be construed according to the intention of the parties, and if it shows that no satisfaction was given or received by or from those released; that the intention was simply to discharge them from the action because they were not liable, it will not affect the rights of the injured party against him who was in fact liable, the fact that it was not intended to release him being shown on the face of the release.<sup>2</sup> The general rule that the release of one of several joint or joint and several debtors or wrong-doers discharges all, applies where one is discharged by law, as in bankruptcy, at the instance or with the consent of the creditor or the party injured.<sup>3</sup> The release of one of several joint debtors, if it does not increase the original responsibilities of the others, will not work a dissolution of the contract to those not released.<sup>4</sup> This is the case where parties are only separately liable; there the discharge of one does not discharge any other.<sup>5</sup> The plaintiff, however, is entitled to only one satisfaction; and if the manner of releasing one involves satisfaction in whole or in part of the claim it will inure to the

248, 18 N. W. Rep. 927; *Kentucky & Indiana Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. Rep. 219.

<sup>1</sup> *Miller v. Beck*, 108 Iowa, 575, 582, 79 N. W. Rep. 344; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. Rep. 518, 36 Am. Rep. 830; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. Rep. 271; *Long v. Long*, 57 Iowa, 497, 10 N. W. Rep. 875; *Knapp v. Roche*, 94 N. Y. 729.

<sup>2</sup> *Derosa v. Hamilton*, 3 Pa. Dist. Rep. 404. The opinion of Simonton, P. J., contains the result of a careful examination of English and American cases on the question of effectuating the intent of the parties giving releases.

<sup>3</sup> *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; 1 Par. on Cont. 29.

<sup>4</sup> *Mortland v. Himes*, 8 Pa. 265.

The release of an infant co-signer

of a note after he has repudiated his liability on attaining his majority and reconveyed his interest in the land which was the consideration for the note does not discharge the other maker. *Young v. Currier*, 63 N. H. 419.

The defense of a release by operation of law is purely personal and the instrument is not cause for setting aside, at the instance of another creditor, a confession of judgment by the person who has been discharged for the amount due on the obligation covered by the release. *Thomas v. Mueller*, 106 Ill. 36.

<sup>5</sup> *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; *Van Rensselaer v. Chadwick*, 24 Barb. 333; *Mathewson v. Lydiate*, Cro. Eliz. 408, 470; *Bac. Abr.*, Release (G.).

discharge, *pro tanto*, of all who are liable therefor.<sup>1</sup> Where two are separately liable for the same debt, and stand in such relation to each other that in case of payment by one there is a right to reimbursement or contribution from the other, then a release of the party bound to reimburse or liable to contribute has been held to be a discharge of both. The reason the release of one joint obligor discharges the other is that if either pays the debt the other is liable to contribution, which would be defeated if it were permitted to exonerate only the party to whom it is made. Thus, where by the constitution and statutes of a state stockholders are personally liable, jointly and severally, for the debts of a corporation, the discharge, by release under seal, of one stockholder was held a discharge not only of all the others but also of the corporation.<sup>2</sup>

<sup>1</sup> *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. Rep. 518; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689; *Kasson v. People*, 44 Barb. 347.

In *Babcock & W. Co. v. Pioneer Iron Works*, 34 Fed. Rep. 338, the bill charged the joint infringement of a patent by P. and S., by the manufacture by P. for sale by S. of the patented article. A settlement was made between complainant and P., the money paid by him "to cover the costs of complainant in this suit against P. and all damages for the infringement by said P. of the letters patent sued on;" all claims and demands against S. were expressly reserved. Held, that the stipulation released S. from liability for both costs and damages. See *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

<sup>2</sup> *Prince v. Lynch*, 38 Cal. 528. Sawyer, C. J., said: "If not jointly liable in the strict sense of that term, as has been suggested, the legal incidents, as between the corporation and stockholders, to the extent of their personal liability, are, it seems to us, precisely the same. The stockholder is not a surety in any sense of the term. He is under the constitution

and statute primarily liable in the same sense as the corporation is primarily liable. The same identical act which casts the liability on the corporation also casts it on the stockholder. There are not separate contracts. The stockholder does not stand in the position of an indorser or guarantor. An indorser or guarantor is not liable on the same contract. His contract is a separate and distinct one of his own, to which the principal is no party. It is founded upon the principal contract, and finds its consideration only in that contract; but it is a separate and distinct contract, nevertheless, and the terms are different. Each is liable on his own particular contract, but there is no joint contract or joint obligation. The maker and indorser or guarantor of a note may be sued jointly, it is true, but this does not result from the fact that there is a single joint contract.

"It is suggested that the reason the release of one joint obligor discharges the other is, that if one pays the debt the other is liable to contribution, which would be defeated by the release if it were per-

[438] A simple contract cannot operate as a release nor be pleaded as such; therefore such an agreement for the discharge of one of several parties jointly or jointly and severally liable must, as before stated, be of such character as to discharge all

mitted to exonerate only the party to whom it is made. On this ground it is said to be held to extinguish the debt. Now this incident attends the relation in question, and this principle is as applicable to it as to the case of two joint makers of a note.

"Suppose the corporation is sued and a recovery had; the stockholder released must contribute his share, for the corporation can levy an assessment on all the stockholders, according to their respective shares, to raise funds to pay the judgment. The corporation must pay it, unless it too is discharged, and the other shareholders are entitled to have him contribute his share. Or, suppose the corporation is in funds, and pays without an assessment, it takes from the stockholder released his *pro rata* share of a fund which would otherwise go to him in dividends, and thus he is made to contribute notwithstanding his release. So, suppose McClelland had sued other stockholders of the corporation and recovered and collected from them the whole amount of his debt; the stockholder or stockholders so compelled to pay would have a claim for contribution against Lynch for his share, and thus either the right to contribution of the stockholder who has been compelled to pay, or the release of Lynch, must be defeated. Suppose, again, that McClelland should discharge all the stockholders from personal liability, as has been suggested, and the corporation itself should still remain liable, each stockholder would still be liable to contribute his *pro rata* share, either in the form of an assessment levied by the corporation to pay the debt, or by a diminution

of dividends, and the release would be defeated, or the corporation deprived of power to protect its property. One of two results must inevitably be reached. Either the debt is extinguished as to all by the release, or the release is wholly inoperative as to all. Thus the incidents and consequences are the same as between joint debtors and joint obligors in any other form. We think, therefore, that the case is within the rule, and that a valid release, under seal, discharges the corporation and other stockholders, as well as the stockholder released. The releases to the defendant, Lynch, referred to in the findings, were in due form and under seal, and we think, to the extent of the amount released, discharged the corporation as well as Lynch. But we think the court erred in holding that the whole \$416.66, due McClelland, was released. The language of the release is: 'I hereby release and discharge said Francis Lynch from *his proportion* of said company's said indebtedness to me.' The release by its express terms, then, is only 'from his proportion of said company's said indebtedness to me;' not from the whole. '*And this shall be said Lynch's receipt in full, to date, for his proportion and share of all indebtedness to me by said company, and a bar to any and all suits against said Lynch for the same;*' that is to say, *for his proportion and share*. It is manifest that McClelland did not intend to release his whole demand, but only Lynch's share. Although Lynch might be liable under the act to pay McClelland the whole demand against the company, as held in *Larabee v. Baldwin*, 35 Cal. 155, if the

by way of accord and satisfaction. If the agreement embraces the entire cause of action, and purports, upon sufficient consideration, to discharge it, it will have that effect as to all the parties liable, though made with only one.<sup>1</sup> But a simple contract to discharge one of several who are liable will not have that effect by force of the agreement, as a release operates, but only by force thereof based upon a sufficient consideration for satisfaction of the entire demand.<sup>2</sup> Hence a conventional discharge which has been given to only one of several who are bound, in order to have the effect of a release as to all and to be pleadable as such, must be a technical release under seal.<sup>3</sup>

**§ 258. What will operate as a release.** No special [440] form of words is necessary if the intention is clear to discharge

amount of the aggregate debts of the corporation upon which he was personally responsible was sufficient; yet, the whole would not be *his share* of the indebtedness, because he would be entitled to recover the excess paid by him over his share from the corporation, and to call upon his co-stockholders, who were personally liable, to contribute. The fact that he might be liable personally, under the statute, in the first instance, to pay the whole to the creditor, does not increase or diminish or in any way affect the amount of his share of the demand."

<sup>1</sup> *Ellis v. Esson*, 50 Wis. 138, 56 Am. Rep. 830, 6 N. W. Rep. 518; *Eastman v. Grant*, 34 Vt. 390; *Matthews v. Chicopee Manuf. Co.*, 3 Robert. 711.

<sup>2</sup> *Ellis v. Esson*, *supra*; *Walker v. McCulloch*, 4 Me. 421; *McAllester v. Sprague*, 34 id. 296; *Rowley v. Stoddard*, 7 Johns. 207; *Harrison v. Close*, 2 id. 449, 3 Am. Dec. 444; *Farmers' Bank v. Blair*, 44 Barb. 641; *Shaw v. Pratt*, 22 Pick. 305; *Smith v. Bartholomew*, 1 Met. 276, 35 Am. Dec. 365. See *Honegger v. Wettstein*, 47 N. Y. Super. Ct. 125.

<sup>3</sup> *Bloss v. Plymale*, 3 W. Va. 393, 100

Am. Dec. 752; *Frink v. Green*, 5 Barb. 455; *De Zeng v. Bailey*, 9 Wend. 336; *Rowley v. Stoddard*, 7 Johns. 207; *McAllester v. Sprague*, 34 Me. 296; *Bronson v. Fitzhugh*, 1 Hill, 185; *Shaw v. Pratt*, 22 Pick. 305; *McAllester v. Dennin*, 27 Mo. 40; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584.

In *Mitchell v. Allen*, 25 Hun, 543, an unsealed instrument acknowledged the payment of money from one of several persons liable for the releasor's injuries; it expressly provided that it was not to affect the other defendants, and that the claims against them were retained. It was held that the discharge of all was a necessary legal result of the satisfaction and discharge of one. The court approved *Ruble v. Turner*, 2 Hen. & Munf. (Va.) 38, where three persons were sued for an assault and battery; pending suit an unsealed stipulation acknowledged satisfaction from one of them and provided that it was not to affect the liability of the others. It was held to work a discharge of all. See *Ellis v. Esson*, 50 Wis. 138, 56 Am. Rep. 830, 6 N. W. Rep. 518, for an interesting discussion of the subject.

the debt.<sup>1</sup> Various acts will have the effect of a release. The act of surrendering a note or other evidence of debt will work that result.<sup>2</sup> A bequest of the debt to the debtor;<sup>3</sup> the intermarriage of the debtor and creditor;<sup>4</sup> appointment of the debtor executor,<sup>5</sup> and the intentional destruction of the evidence of indebtedness,<sup>6</sup> will produce the same result. So, taking judgment against one of several jointly bound without issuing process against the others releases those not sued;<sup>7</sup> and so does taking the body of the debtor or one of several on execution<sup>8</sup> and discharging him or them from custody. Under a statute which authorizes any surety to require a creditor or obligee forthwith to institute an action upon the accrual of the right to do so, and which provides that if it is not done within a reasonable time the surety shall be discharged, only such sureties as have given the notice required are released by the neglect to sue.<sup>9</sup> A release of damages by a widow whose husband was killed is not invalid because it was executed in order that another person, who was named by him as the beneficiary in a mutual insurance policy on his life, might realize the amount due, a condition of it being that any employee of a designated railway company who was a member of the society should release the company from all liability for injuries to him.<sup>10</sup> An agreement by the owner of property which has been seized under a writ against a third person that it may be sold and the proceeds retained in its place does not release a cause of action for the taking and selling.<sup>11</sup> A contract between master and servant which gives the latter, when physically injured, whether as the result of his own negligence or not, or when he is sick, the right to pecuniary aid and other valuable benefits,

<sup>1</sup> 2 Par. on Cont. 713.

<sup>2</sup> *Beach v. Endress*, 51 Barb. 570; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265.

<sup>3</sup> *Hobart v. Stone*, 10 Pick. 215.

<sup>4</sup> *Curtis v. Brooks*, 37 Barb. 476; *Smiley v. Smiley*, 18 Ohio St. 543.

<sup>5</sup> *Thomas v. Thompson*, 2 Johns. 470; *Eichelberger v. Morris*, 6 Watts, 42; *Fishel v. Fishel*, 7 id. 44; *Raab's Estate*, 16 Ohio St. 274.

<sup>6</sup> *Booth v. Smith*, 3 Woods, 19.

<sup>7</sup> *Mitchell v. Brewster*, 28 Ill. 163;

*Anderson v. Levan*, 1 W. & S. 334; *Jones v. Johnson*, 3 id. 276, 78 Am. Dec. 760; *Stewart's Appeal*, 3 Watts, 476.

<sup>8</sup> *Gould v. Gould*, 4 N. H. 173; *Palethorpe v. Leshner*, 2 Rawle, 272; *Sharp v. Speckenagle*, 3 S. & R. 464.

<sup>9</sup> *Cochran v. Orr*, 94 Ind. 433.

<sup>10</sup> *State v. Baltimore & O. R. Co.*, 36 Fed. Rep. 655. See *Fuller v. Baltimore & O. Relief Ass'n*, 67 Md. 433, 10 Atl. Rep. 237.

<sup>11</sup> *Sartwell v. Moses*, 62 N. H. 355.



and which make the acceptance of these operate as a release of the master, is not contrary to public policy.<sup>1</sup>

§ 259. **Covenant not to sue.** A covenant with a sole debtor or all the debtors never to sue, or not to sue without any limitation of time, will, on the principle of avoiding circuity of action, have the effect of a release.<sup>2</sup> For the same reason a covenant by the creditor to indemnify the debtor against the particular debt is a release.<sup>3</sup> But a covenant not to sue one of several joint debtors or joint obligors, or to indemnify him, is not a release; the covenantee's only remedy is by [441] action on the covenant;<sup>4</sup> because it cannot be inferred from

<sup>1</sup> *Petty v. Brunswick & W. R. Co.*, 109 Ga. 666, 35 S. E. Rep. 82. See § 6.

<sup>2</sup> *McChesney v. Bell*, 59 Ill. App. 84; *White v. Richmond & D. R. Co.*, 110 N. C. 456, 15 S. E. Rep. 197; *Kennerly v. Etiwan Phosphate Co.*, 17 S. C. 411, 43 Am. Rep. 607; *Clopper v. Union Bank*, 7 Har. & J. 92; *Parker v. Holmes*, 4 N. H. 97; *Hodges v. Smith*, Cro. Eliz. 623; *Cuyler v. Cuyler*, 2 Johns. 186; *Arnold v. Park*, 8 Bush, 3; 2 Saund. 478, note (1); *Deux v. Jefferies*, Cro. Eliz. 353; *Ford v. Beach*, 11 Q. B. 842; *Willis v. De Castro*, 4 C. B. (N. S.) 216; *Badeley v. Vigurs*, 4 El. & B. 71; *Giles v. Spencer*, 3 C. B. (N. S.) 244; *Phelps v. Johnson*, 8 Johns. 54; *Clark v. Bush*, 3 Cow. 151; *Brown v. Williams*, 4 Wend. 360; *Hosack v. Rogers*, 8 Paige, 229; *Hastings v. Dickinson*, 7 Mass. 155, 5 Am. Dec. 34; *Shed v. Pierce*, 17 Mass. 623; *Williamson v. McGinnis*, 11 B. Mon. 74, 52 Am. Dec. 561; *Lane v. Owings*, 3 Bibb, 247; *Harvey v. Harvey*, 3 Ind. 473; *Reed v. Shaw*, 1 Blackf. 245; *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *Garnett v. Macon*, 6 Cal. 308; *Lacy v. Kynaston*, 2 Salk. 575, 12 Mod. 548, 1 Ld. Raym. 688; *Dean v. Newhall*, 8 T. R. 168. See *Kowing v. Manly*, 2 Abb. Pr. (N. S.) 377.

<sup>3</sup> *Connop v. Levy*, 11 Q. B. 769; *Clark v. Bush*, 3 Cow. 151.

<sup>4</sup> *Chicago v. Babcock*, 143 Ill. 358,

32 N. E. Rep. 271; *Benton v. Mullen*, 61 N. H. 125; *Tuckerman v. Newhall*, 17 Mass. 581; *Miller v. Fenton*, 11 Paige, 18; *Harrison v. Close*, 2 Johns. 448, 3 Am. Dec. 444; *Catskill Bank v. Messenger*, 9 Cow. 37; *Rowley v. Stoddard*, 7 Johns. 207; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Couch v. Mills*, 21 id. 424; *Shed v. Pierce*, 17 Mass. 623; *Goodnow v. Smith*, 18 Pick. 414, 29 Am. Dec. 600; *Aylesworth v. Brown*, 31 Ind. 270; *Carondelet v. Desnoyer*, 27 Mo. 36; *Walker v. McCulloch*, 4 Me. 421; *Williamson v. McGinnis*, 11 B. Mon. 74, 52 Am. Dec. 561; *Lane v. Owings*, 3 Bibb, 247; *Frink v. Green*, 5 Barb. 455; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Mason v. Jouett*, 2 Dana, 107; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Durell v. Wendell*, 8 N. H. 369; *Parker v. Holmes*, 4 id. 97; *Smith v. Mapleback*, 1 T. R. 441; *Hutton v. Eyre*, 6 Taunt. 289; *Gibson v. Gibson*, 15 Mass. 112; *Ward v. Johnson*, 6 Munf. 6, 8 Am. Dec. 729; *Thimbleby v. Barron*, 3 M. & W. 210; *Dow v. Tuttle*, 4 Mass. 414, 3 Am. Dec. 226; *Aloff v. Scrimshaw*, 2 Salk. 573; *Hoffman v. Brown*, 6 N. J. L. 429; *Fullman v. Valentine*, 11 Pick. 159; *Garnett v. Macon*, 6 Cal. 308; *Lacy v. Kynaston*, 2 Salk. 575, 12 Mod. 548, 1 Ld. Raym. 688; *Dean v. Newhall*, 8 T. R. 168.

such a covenant that it was the intention to discharge the debt.<sup>1</sup> It cannot avail as an estoppel in order to avoid circuitry of action. It is said by high authority that a covenant containing no words of release has never been construed as a release unless it gave the party claiming the benefit of that construction a right of action which would precisely counter-vail that to which he was liable; and, unless, also, it was the intention of the parties that the last instrument should defeat the first.<sup>2</sup> And where two are jointly and severally bound a covenant not to sue one does not amount to a release of the other,<sup>3</sup> unless, perhaps, the covenant be given after a suit had been brought separately against one, and the creditor had by that action chosen to consider the covenantee the sole debtor.<sup>4</sup> The amount paid, however, upon the demand by way of partial discharge as a consideration for such a covenant will be regarded as satisfaction to that extent.<sup>5</sup> Nor will a covenant with a debtor not to sue for a limited time suspend the right of action.<sup>6</sup>

[442] The release of the principal debtor will absolve the sureties, and the release of a primary security will discharge collaterals.<sup>7</sup> But it is competent to provide otherwise and to

<sup>1</sup> *Id.*; *Ruggles v. Patton*, 8 Mass. 480; *Sewall v. Sparrow*, 16 id. 24; *Shed v. Pierce*, 17 id. 623; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Walker v. McCulloch*, 4 Me. 421; *Durell v. Wendell*, 8 N. H. 369.

<sup>2</sup> *Garnet v. Macon*, 6 Call. 308. See *Berry v. Gillis*, 17 N. H. 9, 48 Am. Dec. 584.

<sup>3</sup> *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. Rep. 271; *Bates v. Wills Point Bank*, 11 Tex. Civ. App. 73, 32 S. W. Rep. 339; *Lacy v. Kynaston*, 12 Mod. 548, 551; *Ward v. Johnson*, 6 Munf. 6, 7 Am. Dec. 729; *Tuckerman v. Newhall*, 17 Mass. 581; *Hutton v. Eyre*, 6 Taunt. 289.

<sup>4</sup> *Shed v. Pierce*, 17 Mass. 623.

<sup>5</sup> *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140.

<sup>6</sup> *Id.*; *Guard v. Whiteside*, 13 Ill. 7; *Foster v. Purdy*, 5 Met. 442; *Howland v. Marvin*, 5 Cal. 501; *Clark v.*

*Russel*, 3 Watts, 213; *Hamaker v. Eberley*, 2 Bin. 510; *Berry v. Bates*, 2 Blackf. 118; *Reed v. Shaw*, 1 id. 245; *Thalman v. Barbour*, 5 Ind. 178; *Lowe v. Blair*, 6 Blackf. 282; *Pearl v. Wells*, 6 Wend. 291; *Chandler v. Herick*, 19 Johns. 129; *Winans v. Huston*, 6 Wend. 471; *Perkins v. Gilman*, 8 Pick. 229; *Couch v. Mills*, 21 Wend. 424. But see *Clopper v. Union Bank*, 7 Har. & J. 92, 16 Am. Dec. 294; *Blair v. Reid*, 20 Tex. 310; *Morgan v. Butterfield*, 3 Mich. 615.

<sup>7</sup> *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *Mottram v. Mills*, 2 Sandf. 189; *Newcomb v. Raynor*, 21 Wend. 108, 34 Am. Dec. 219; *Brown v. Williams*, 4 Wend. 360.

A release by an acceptor of the drawer, discharging him from any claim for damages, etc., as drawer of a bill, will not bar an action by the acceptor for money paid to take up

reserve a right to resort to securities.<sup>1</sup> And a release may, by express provision, discharge one of several who are liable, and exempt others from its operation. In such case the action may be brought against all for the purpose of recovery against those not released.<sup>2</sup> Such a reservation or limitation cannot be made by parol.<sup>3</sup> When, however, the debtor, or one of several debtors jointly bound, stipulates that his discharge shall not prevent a recovery against other parties, it is implied that he will not set it up against them when they have paid the demand and call on him for reimbursement or contribution.<sup>4</sup> A release cannot take effect *in futuro* or upon a future right of action; but only upon some present right either complete or inchoate; it may be so framed as to cut off a conditional or contingent liability, as for example that of an indorser.<sup>5</sup>

the bill for the drawer's accommodation. *Pearce v. Wilkins*, 2 N. Y. 469, affirming *Wilkins v. Pearce*, 5 Denio, 541.

<sup>1</sup> *Pierce v. Sweet*, 33 Pa. 151; *Bruen v. Marquand*, 17 Johns. 58; *Stewart v. Eden*, 2 Cai. 121, 2 Am. Dec. 222; *Sohier v. Loring*, 6 Cush. 537; *Hutchins v. Nichols*, 10 id. 299; *Seymour v. Minturn*, 17 Johns. 169; *Keeler v. Bartine*, 12 Wend. 110; *Hubbell v. Carpenter*, 5 N. Y. 171. See *Matthews v. Chicopee Manuf. Co.*, 3 Robert. 711.

<sup>2</sup> *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290; *Twopenny v. Young*, 3 B. & C. 211; *Lancaster v. Harrison*, 4 M. & P. 561, 6 Bing. 726; *Solly v. Forbes*, 2 Brod. & Bing. 38; *North v. Wakefield*, 13 Q. B. 538.

<sup>3</sup> *Bronson v. Fitzhugh*, 1 Hill, 185; *Brooks v. Stuart*, 9 A. & E. 854.

<sup>4</sup> 1 Par. on Con. 285; *Hubbell v. Carpenter*, 5 N. Y. 171; *Pitman on Pr. & Surety*, 181-2, 189. See 1 *Brandt on Suretyship* (2d ed.), § 147.

<sup>5</sup> *Reed v. Tarbell*, 4 Met. 93; *Nichols v. Tracy*, 1 Sandf. 278; *Pierce v. Parker*, 4 Met. 80; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Gibson v. Gibson*, 15 Mass. 110, 8 Am. Dec. 94.

Parsons says (2 Par. on Con. 714): "A release, strictly speaking, can operate only on a present right, because one can give only what he has, and can only promise to give what he may have in future. But where one is possessed of a distinct right, which is to come into effect and operation hereafter, a release in words of the present may discharge this right."

In *Martin v. Baltimore & O. R. Co.*, 41 Fed. Rep. 125, an employee of defendant became a member of a relief association, and as a condition of membership and in consideration of funds paid by defendant to said association and its guaranty of the payment of the benefits promised by the association signed a contract releasing defendant from any liability to him by reason of accident while in its service. Bond, J., charged the jury that if, prior to the plaintiff's employment, he signed such contract and received the benefits arising therefrom before and after suit brought, and gave receipts for the money paid, which receipts released and discharged the defendant, he could not recover. See § 6.

## SECTION 5.

## TENDER.

[443] § 260. **Right to make.** Though a *tender*, not accepted, does not go to the extent of liquidation, it is so connected with the subject of payment as to justify some consideration of it in this connection. A debtor has the right at common law, before suit, to tender the amount due to his creditor upon a certain and liquidated demand, and thereby save himself from the payment of subsequent interest and costs.

§ 261. **On what demands it may be made.** It seems that a tender may be made on a *quantum meruit*,<sup>1</sup> but not on a claim for unliquidated damages.<sup>2</sup> It may be pleaded in an action on a bare covenant for the payment of money.<sup>3</sup> In an action for breach of contract the court cannot compel the acceptance in mitigation of damages of the property for the non-delivery of which the action is brought on a tender of it being made on the trial.<sup>4</sup>

§ 262. **When it may be made.** At common law the tender must be made before the commencement of the suit,<sup>5</sup> but this

<sup>1</sup> Johnson v. Lancaster, 1 Str. 576. See Dearle v. Barrett, 2 A. & E. 82.

<sup>2</sup> Id.; Green v. Shurtliff, 19 Vt. 592; Gregory v. Wells, 62 Ill. 232; Cilley v. Hawkins, 48 Ill. 308; McDowell v. Keller, 4 Cold. 258; Davys v. Richardson, 21 Q. B. Div. 202; Kaw Valley Fair Ass'n v. Miller, 42 Kan. 20, 21 Pac. Rep. 794.

If a tender for such damages is authorized by statute, the tender must be kept good. Dunbar v. De Boer, 44 Ill. App. 615. *Contra*, McPherson v. James, 69 id. 337.

<sup>3</sup> Johnson v. Clay, 7 Taunt. 486, 1 Moore, 200. See Mitchell v. Gregory, 1 Bibb, 449; § 383.

<sup>4</sup> Colby v. Reed, 99 U. S. 560.

<sup>5</sup> Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. Rep. 854; Colby v. Reed, 99 U. S. 560; Bac. Abr., Tender; Fishburne v. Sanders, 1 N. & McC. 242; Reed v. Woodman, 17 Me. 43; Knight v. Beach, 7 Abb. Pr. (N. S.) 241; Suf-

folk Bank v. Worcester Bank, 5 Pick. 106; Jackson v. Law, 5 Cow. 248; Retan v. Drew, 19 Wend. 304.

In Sweetland v. Tuthill, 54 Ill. 215, Walker, J., said: "It is first urged that our practice does not warrant the payment of money into court, so as to escape the payment of the costs of the suit. This may be true, but we deem it unnecessary to determine that question in this case. The law does clearly authorize a debtor to make a tender of the amount he owes his creditor, and thus relieve himself from costs if a suit shall afterwards be brought. And no reason is perceived why a debtor may not, even after a suit is brought, and at any time before the trial, make a sufficient tender and relieve himself from future costs." See Thurston v. Marsh, 14 How. Pr. 572.

limitation has long since been generally abrogated by statute. It is no answer to a plea of tender, before the commence- [444] ment of the suit, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a writ against the defendant, and the attorney had accordingly applied for such writ before the tender, and it was afterwards sued out.<sup>1</sup> In strictness the plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract, and therefore it is not good if made after the day fixed for payment.<sup>2</sup> But this rigid rule is not adhered to in this country, and in many of the states the right of tender at any time after the debt is due is recognized.<sup>3</sup> Tender of the sum due on a mortgage any time before foreclosure discharges the lien,<sup>4</sup> and under a statute authorizing the redemption of mortgaged chattels any time before foreclosure the mortgagor may so make a tender notwithstanding the mortgagee has taken possession of the property under the mortgage after condition broken.<sup>5</sup> Where goods have been sold and title reserved as security for the unpaid portion of the price and payments have been received after the time fixed for full payment, the vendor cannot retake the goods without notice and demand. A tender on demand is sufficient to protect the vendee's right of possession.<sup>6</sup> A tender by the defendant to the plaintiff pending an appeal by the latter from a judgment in his favor, if refused, stops interest.<sup>7</sup> If payment is required to be made within a certain period which ends on Sunday, a tender the next day is in time.<sup>8</sup> It may be made on an interest-bearing debt before it is due, tendering the amount which would be due at ma-

<sup>1</sup> Briggs v. Calverly, 8 T. R. 629. See Kirton v. Braithwaite, 1 M. & W. 310; Hull v. Peters, 7 Barb. 331.

<sup>2</sup> Hume v. Peploe, 8 East, 168; Poole v. Tumbridge, 2 M. & W. 223; Dobie v. Larkan, 10 Ex. 776; City Bank v. Cutter, 3 Pick. 414; Suffolk Bank v. Worcester Bank, 5 id. 106; Dewey v. Humphrey, id. 187; Frazier v. Cushman, 12 Mass. 277; Rose v. Brown, Kirby, 293, 1 Am. Dec. 22; Tracy v. Strong, 2 Conn. 659; Ashburn v. Poulter, 35 id. 553.

<sup>3</sup> 2 Par. on Cont. 642.

<sup>4</sup> Kortright v. Cady, 21 N. Y. 343.

<sup>5</sup> Davies v. Dow, 80 Minn. 223, 83 N. W. Rep. 50.

<sup>6</sup> People's Furniture & Carpet Co. v. Crosby, 57 Neb. 282, 77 N. W. Rep. 658, 73 Am. St. 504, citing O'Rourke v. Hadcock, 114 N. Y. 541, 22 N. E. Rep. 33; Taylor v. Finley, 48 Vt. 78; New Home Sewing Machine Co. v. Bothane, 70 Mich. 443, 38 N. W. Rep. 326.

<sup>7</sup> Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. Rep. 308.

<sup>8</sup> Sands v. Lyon, 18 Conn. 18.

turity.<sup>1</sup> Some doubt has been expressed whether a tender is good of a debt not bearing interest before it is due.<sup>2</sup> A vendor cannot be placed in default by a tender of the purchase-money before the stipulated time for payment;<sup>3</sup> nor can a premature tender affect the security for a debt;<sup>4</sup> nor any other right of the creditor.<sup>5</sup> A tender on a past-due obligation is good though preliminary notice of it is not given.<sup>6</sup> The necessity of such notice in England when a *post diem* tender of the money due upon a mortgage is made rests entirely on custom.<sup>7</sup>

In computing the time, after entry for condition of a mortgage broken, within which a mortgagor may redeem the day of entry is to be excluded.<sup>8</sup> And where payment must be made, as in such a case within a certain period, it has been made a question at what time of the last day the right of payment or tender expires. In the old cases it is held that payment should be made at a convenient time in which the money may be counted before sunset.<sup>9</sup> It is probable that

<sup>1</sup> *Eaton v. Emerson*, 14 Me. 335; *Tillou v. Britton*, 9 N. J. L. 120; *Saunders v. Frost*, 5 Pick. 259; *Bacon v. Hooker*, 153 Mass. 554, 54 N. E. Rep. 253.

A tender of the amount due on a promissory note is good if made at the time fixed for payment, though before the expiration of the days of grace, interest for such days being included. *Wyckoff v. Anthony*, 9 Daly, 417. On appeal this question was not passed upon, it being held that the right to object to the tender at the time it was made was waived. *Wyckoff v. Anthony*, 90 N. Y. 442.

<sup>2</sup> 2 Par. on Cont. 642. See *McHard v. Whetcroft*, 3 Har. & McH. 85.

<sup>3</sup> *Rhorer v. Bila*, 83 Cal. 51, 23 Pac. Rep. 274; *Reed v. Rudman*, 5 Ind. 409; *Cogan v. Cook*, 22 Minn. 137.

<sup>4</sup> *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. Rep. 158.

<sup>5</sup> *Moore v. Kime*, 43 Neb. 517, 61 N. W. Rep. 736; *Burns v. True*, 5 Tex. Civ. App. 74, 24 S. W. Rep. 338; *Ab-*

*shire v. Corey*, 113 Ind. 484, 15 N. E. Rep. 685.

<sup>6</sup> *Sharp v. Wyckoff*, 39 N. J. Eq. 376.

<sup>7</sup> *Browne v. Lockhart*, 10 Sim. 420, 424.

<sup>8</sup> *Wing v. Davis*, 7 Me. 31.

The necessity of a tender for such purpose is denied. *Quin v. Brittain*, Hoff. Ch. 353; *Beach v. Cooke*, 14 N. Y. 508; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. Rep. 1000; especially if the person seeking to redeem does not know, because of the mortgagee's fault, the sum due. *Aust v. Rosenbaum*, 14 Miss. 893, 21 So. Rep. 555.

<sup>9</sup> In *Wade's Case*, 5 Coke, 114a, it was said: "Although the last time of payment of the money by force of the condition is a convenient time in which the money may be counted before sunset, yet, if the tender be made to him who ought to receive it at the place specified in the condition, at any time of the day, and he refuse it, the condition is forever saved, and the mortgagor

the courts would not now recognize the rule as a fixed [445] and arbitrary requirement, without regard to circumstances necessitating a tender while the daylight lasts. There [446] is some reason for holding a tender unseasonable which is

or obligor needs not make a tender of it again before the last instant." See Coke Litt. 202.

In *Wing v. Davis*, 7 Me. 31, the validity of a tender made late in the evening of the last day to redeem after entry for condition broken was in question. Mellen, C. J., said: "In *Hill v. Grange*, 1 Plowd. 178, the condition was to pay rent within ten days after certain feasts, in which case the justices unanimously held that the lessee had liberty within the ten days; and, therefore, they observe 'the lessee is in no danger as long as he has time to come and pay it; and he has time to come and pay it as long as the tenth day continues, and the tenth day continues until the night comes; and when the night is come, then his time elapses. So that his time to pay continues until the separation of day and night. And in arguing this point, Robert Brook, chief justice, and Saunders, said that if the rent reserved was a great sum, as £500 or £1,000, the lessee ought to be ready to pay it in such convenient time before sunset in which the money might be counted; for the lessor is not bound to count it in the night, after sunset, for if so he might be deceived; for Brook said: '*Qui ambulat in tenebris nescit qua vadit.*' The language of the court in the case of *Greeley v. Thurston* does not advance a different principle. The question is, what is the whole day in relation to a tender in contracts of this character. We are not aware that modern decisions have changed the law as established by the old cases; or the facts necessary to be proved to support a plea of tender, except so far

as the conduct of the creditor may in certain cases amount to a waiver of objections against the formality of the tender, or in case of his artful avoidance or evasion. In the case before us there is nothing like a waiver as to the unseasonableness of the hour; in fact, this was the objection made by the defendants at the time of the alleged tender, which was attempted to be made not long before midnight, when the defendants and their families were asleep, and all the lights extinguished. No reason has been assigned why a payment or a tender was delayed to so unusual an hour; and if a loss to the plaintiff is the consequence of this strange delay, he must thank his own imprudence. We do not decide that a tender may not, in any circumstances, be good, though made after the departure of daylight; it is not necessary to intimate any opinion on the point. Our decision is founded on the facts of this case; and the tender not having been made in due season, we need not inquire as to the sufficiency of the sum which was offered."

In *Greeley v. Thurston*, 4 Me. 479, 16 Am. Dec. 285, the question was when the default of the maker of a promissory note occurred, he claiming that he had the whole of the last day in which to pay it, and that until that day is passed he cannot be said to have broken his contract. Weston, J., said: "There is no question that with regard to bonds, mortgages and instruments in writing, other than notes of hand or bills of exchange, the party who engaged to pay money, or to perform any other duty, fulfills his contract, if he does

made late at night if the creditor has gone to bed, and de-  
[447] clines to consider it on that ground, where no cause for  
so delaying it exists.<sup>1</sup> A late judicial exposition of the ques-  
tion is to the effect that, where no place is named in the

so on any part of the day appointed. Unless the case of negotiable paper forms an exception to the general rule which attaches to other written contracts, the maker of a negotiable note of hand and the acceptor of a bill of exchange are not liable to be sued until the day after these instruments become due and payable. In the case of *Leftey v. Mills*, 4 T. R. 170, we have the opinion of Mr. Justice Buller, given in strong terms, although the decision was finally placed upon another ground, that the general rule before intimated does not apply to bills of exchange. In that case a clerk called with the bill, upon which the question arose, at the house of the defendant, the acceptor, on the day it became due, and, not finding him at home, left word where the bill might be found, that the defendant might send and take it up; this not being done at six o'clock in the evening it was noted for non-payment. Between seven and eight o'clock the same clerk called again on the defendant with the bill, who then offered to pay the amount of it, but refused to pay an additional half-crown for the notary. Lord Kenyon was of opinion, at the trial, that the tender was sufficient, and directed a verdict for the defendant. A rule was obtained to show cause why the verdict should not be set aside and a new trial granted. The court said, in granting the rule, that the main question was whether the acceptor had the whole day to pay the bill in, or whether it became due on demand at any time on the last day. After

argument, Lord Kenyon stated in this, as in other contracts, the acceptor had the whole day; but said, if there were any difference between bills of exchange and other contracts in this respect, the claim of the notary could not be supported, this being an inland bill payable fourteen days after sight, and the statute of William, which first authorized a protest upon inland bills, giving it only upon such bills as were payable a certain number of days after date. Upon this last ground Buller, J., concurred; and he added: 'I cannot refrain from expressing my dissent to what has fallen from my lord respecting the time when the payment of bills of exchange may be enforced. One of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand on any part of the third day of grace; and that rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace; now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has until the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning,

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<sup>1</sup> *Wing v. Davis*, 7 Me. 31.



agreement for the making of payment, or no established usage prevails to the contrary, as in the case of notes and bills, the payer has the whole of the day, at any place where he may meet the payee, and both may have the proper means and opportunity of making and receiving the tender. The party bound must do all that, without the concurrence of the other, he can do to make the payment or perform the act, and that at a convenient time before midnight, such time varying according to the *quantum* of payment or the nature of the act to be done. If he is to pay money it must be tendered at a sufficient time before midnight for the tenderee to receive and count it.<sup>1</sup> This rule may well be qualified by adding a condition that the tender shall be made at such time as will give the creditor an opportunity to ascertain the state of the account between him and his debtor; because he is not bound to know at his peril at all times the exact sum due him;<sup>2</sup> and besides the law will doubtless take account of the fact that business men are not at all times prepared to surrender the evidences of their claims against their debtors. Commercial paper being payable on the day of maturity at any reasonable hour when demanded, a breach of the contract to pay may occur whenever such demand is made. In the absence, however, of any demand the debtor upon such paper undoubtedly has the same time on the last day to fulfill his promise as when he is indebted in any other form.<sup>3</sup>

§ 263. In what money. The offer must be made in legal tender money of the country, if it is demanded.<sup>4</sup> But where

would be an unreasonable hour; but, on the other hand, to say that the demand should be postponed until midnight would be to establish a rule attended with mischievous consequences.' Upon consideration we adopt the views of Mr. Justice Buller; and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour; on the day they fall due; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser and drawer also, after notice given

or duly forwarded." *Shed v. Brett*, 1 Pick. 401; *City Bank v. Cutter*, 3 Pick. 414.

<sup>1</sup> *Smith v. Walton*, 5 Houst. 141, following *Startup v. Macdonald*, 6 M. & G. 593, 624, 46 Eng. C. L. 623.

<sup>2</sup> *Root v. Bradley*, 49 Mich. 27, 12 N. W. Rep. 896; *Waldron v. Murphy*, 40 Mich. 668; *Chase v. Welsh*, 45 Mich. 345, 7 N. W. Rep. 895.

<sup>3</sup> *Sweet v. Harding*, 19 Vt. 587.

<sup>4</sup> *Wilson v. McVey*, 83 Ind. 108; *Collier v. White*, 67 Miss. 133, 6 So. Rep. 618; *Wharton v. Morris*, 1 Dall. 124; *Moody v. Mahurin*, 4 N. H. 296;

bank or treasury notes which circulate as money, though not made a legal tender, are offered, the objection that they are not legal tender is deemed one of form, and waived if not specially made, or if objection is rested on some other ground;<sup>1</sup> [448] for to invalidate a tender or to divest an offer to pay of the legal effect of a tender, if the objection is to the medium or currency and not to the sum offered, the ground of it must be stated, or the right to object in that respect will be waived, and it cannot afterwards be taken advantage of in court on the score of the tender not being legal; in other words, an objection on a point of fact works a waiver of an objection on points of law.<sup>2</sup> It is a general rule that if a tender is refused on a specified ground of objection no other can afterwards be relied upon.<sup>3</sup> This applies, however, only to such objections as could be obviated, and not to a tender made before a debt is due.<sup>4</sup> An offer of depreciated bank notes, without any explanation, is in legal effect but an offer of compromise or of

Lee v. Biddis, 1 Dall. 175; Long v. Waters, 47 Ala. 624; Hallowell & A. Bank v. Howard, 13 Mass. 235; Lange v. Kohne, 1 McCord, 115; Smith v. Keels, 15 Rich. 318; Magraw v. McGlynn, 26 Cal. 420; Martin v. Bott, 17 Ind. App. 444, 46 N. E. Rep. 151 (a finding that a tender was made of the "lawful sum in money" is not a finding that it was made in legal tender). See Tate v. Smith, 70 N. C. 685; Graves v. Hardesty, 19 La. Ann. 186; Parker v. Broas, 20 id. 167; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285.

<sup>1</sup> Koehler v. Buhl, 94 Mich. 496, 54 N. W. Rep. 157; Cooley v. Weeks, 10 Yerg. 141; Ball v. Stanley, 5 id. 199, 26 Am. Dec. 263; Fosdick v. Van Husan, 21 Mich. 567; Curtiss v. Greenbanks, 24 Vt. 586; Warren v. Mains, 7 Johns. 476; Holmes v. Holmes, 12 Barb. 137; Wheeler v. Knaggs, 8 Ohio, 172; Lockyer v. Jones, Peake, 180, n.; Wright v. Reed, 3 T. R. 554; Brown v. Saul, 4 Esp. 267; Polglass v. Oliver, 2 Cr. & J. 15; Tiley v. Courtier, id. 16, n.; Saunders v. Graham,

Gow, 121; Brown v. Dysinger, 1 Rawle, 408; Snow v. Perry, 9 Pick. 539; Towson v. Havre de Grace Bank, 6 H. & J. 53; Williams v. Rorer, 7 Mo. 555; Seawell v. Henry, 6 Ala. 226; Noe v. Hodges, 3 Humph. 162; Cummings v. Putnam, 19 N. H. 569; Brown v. Simons, 44 id. 475; Snow v. Perry, 9 Pick. 539.

<sup>2</sup> Polglass v. Oliver, 2 Cr. & J. 15; Gradle v. Warner, 140 Ill. 123, 29 N. E. Rep. 1118. See Waldron v. Murphy, 40 Mich. 668, and § 270.

<sup>3</sup> McGrath v. Gegner, 77 Md. 331, 26 Atl. Rep. 502, 39 Am. St. 415.

In Moynahan v. Moore, 9 Mich. 9, it was said to be "a well established principle, that an objection made at the time of tender precludes all others, and if that be not well grounded the tender will be held good." See Perkins v. Dunlap, 5 Me. 268, 271; Hull v. Peters, 7 Barb. 331; Carman v. Pultz, 21 N. Y. 547; Keller v. Fisher, 7 Ind. 718; Stokes v. Recknagle, 38 N. Y. Super. Ct. 368; § 270.

<sup>4</sup> Mitchell v. Cook, 29 Barb. 243.

accord and satisfaction, and not a legal tender,<sup>1</sup> unless they are tendered to the bank which issued them.<sup>2</sup> Even a check for money handed the payee or sent by a letter is a good tender, where no objection is made on that ground, but only to the amount.<sup>3</sup> But when the party entitled to payment is not present and has no opportunity to urge the objection, he cannot be presumed to have waived it by his silence.<sup>4</sup> A note for dollars payable in gold and silver is payable in money, and neither bullion, nor gold and silver in any other form than money, is a legal tender.<sup>5</sup> In an action for the breach of a covenant of seizin a tender of the amount paid by the grantee and of the unpaid notes and mortgage executed by him to secure the balance of the purchase price is good.<sup>6</sup>

§ 264. **By whom.** Of course it may be made by an authorized agent.<sup>7</sup> Where the tender is made in behalf of the debtor, strict authority at the time does not seem to be requisite; it being for his benefit and in his name, it may be effectual without such agency as would enable the person making it [449] to do any act which would bind the debtor. Thus, a tender made for an infant by his uncle has been held good, though he was not at that time his guardian.<sup>8</sup> So when an agent was sent to tender a sum less than that demanded, and he added of his own funds to the sum furnished by his principal and tendered the full amount required, it was held good.<sup>9</sup> A tender made by an inhabitant of a school district to one having a claim against it was held good, though such inhabitant

<sup>1</sup> *Newberry v. Trowbridge*, 13 Mich. 263.

A certified check was tendered and returned for insufficiency in amount; but the court found that it was sufficient; the check was then deposited in court, and while there deposited the bank on which it was drawn failed. It was held that the check, if accepted, would have been only conditional payment, and the loss resulting from its non-payment must be borne by the drawer. *Larsen v. Breene*, 12 Colo. 480, 21 Pac. Rep. 498.

<sup>2</sup> *Northampton Bank v. Balliet*, 8 W. & S. 311, 42 Am. Dec. 297.

<sup>3</sup> *Jennings v. Mendenhall*, 7 Ohio St. 258; *Jones v. Arthur*, 8 Dowl. P. C. 442; *Shipp v. Stacker*, 8 Mo. 145; *Petrie v. Smith*, 1 Bay, 115; *Wyckoff v. Anthony*, 9 Daly, 417; *Harriman v. Meyer*, 45 Ark. 37.

<sup>4</sup> *Sloan v. Petrie*, 16 Ill. 262; *Hubbard v. Chenango Bank*, 8 Cow. 88; *Ward v. Smith*, 7 Wall. 447.

<sup>5</sup> *Hart v. Flynn's Ex'r*, 8 Dana, 190.

<sup>6</sup> *Conrad v. Trustees of Grand Grove*, 64 Wis. 258, 25 N. W. Rep. 24.

<sup>7</sup> *Eslow v. Mitchell*, 26 Mich. 500.

<sup>8</sup> *Brown v. Dysinger*, 1 Rawle, 408. See *Coke Litt.* 206b.

<sup>9</sup> *Read v. Goldring*, 2 M. & S. 86.

was not regularly authorized to do so.<sup>1</sup> A corporation appointed three agents to tender a sum to B. and obtain from him a reconveyance of a certain estate conveyed to him by the corporation as security for a debt; one of the three made the tender and it was held good.<sup>2</sup> A person having no interest in the tender has no right to make it in his own behalf.<sup>3</sup> He should make it in behalf of the debtor and so inform the creditor.<sup>4</sup> The creditor must object on the ground of a want of authority or the right to do so is waived.<sup>5</sup> If a tender is made by the debtor's prior authority, or is subsequently ratified, it is good.<sup>6</sup> Any person may make a tender for an idiot.<sup>7</sup> A tender of the amount due one who has purchased land at a tax sale is not good if it is made by several persons, one of whom has no right to redeem.<sup>8</sup> A mortgagee may refuse a tender of the amount due him made by one who is a stranger to him and to the mortgagor, and who is not acting in the interest or at the request of the latter, though he had tax titles on the mortgaged property, they not being subject to the mortgage.<sup>9</sup> One who has purchased mortgaged premises and mortgaged chattels thereon from the mortgagor, the former subject to existing liens, has no authority to make a tender of the amount due on the latter, the debt accrued thereby being payable on demand and none being made.<sup>10</sup> But it is otherwise where a tender is made by the mortgagor's grantee after the debt is due, the creditor having knowledge of the transfer.<sup>11</sup> A tender of the amount of a mortgage lien by the assignee in insolvency of the mortgagor has the same effect as if made by the latter;<sup>12</sup> and so of a tender by the vendee of chattels.<sup>13</sup> A tender by a subsequent grantee of the

<sup>1</sup> Kincaid v. School District, 11 Me. 188.

<sup>2</sup> St. Paul Division No. 1, Sons of Temperance v. Brown, 11 Minn. 356.

<sup>3</sup> Mahler v. Newbaur, 32 Cal. 168, 91 Am. Dec. 571.

<sup>4</sup> Id.; McDougald v. Dougherty, 11 Ga. 570.

<sup>5</sup> Lampley v. Weed, 27 Ala. 621.

<sup>6</sup> Harding v. Davies, 2 C. & P. 77; McIniffe v. Wheelock, 1 Gray, 600; Eslow v. Mitchell, 26 Mich. 500.

<sup>7</sup> Coke Litt. 206b; Brown v. Dyingier, 1 Rawle, 468.

<sup>8</sup> Bender v. Bean, 52 Ark. 132, 12 S. W. Rep. 180, 241.

<sup>9</sup> Sinclair v. Learned, 51 Mich. 335, 16 N. W. Rep. 672.

<sup>10</sup> Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. Rep. 158, 30 Hun, 466.

<sup>11</sup> Yeager v. Groves, 78 Ky. 278.

<sup>12</sup> Davies v. Dow, 80 Minn. 223, 83 N. W. Rep. 50.

<sup>13</sup> Flanigan v. Seelye, 53 Minn. 23, 55 N. W. Rep. 115.

equity of redemption is good.<sup>1</sup> An executor has no authority to make a tender to a legatee in a jurisdiction in which his foreign letters have not been recognized although the funds tendered were realized from the personal property of the testator situated in the jurisdiction in which the tender was made. A tender so made is not validated by the subsequent issuance of letters from a court in the jurisdiction in which the legatee was at the time it was made.<sup>2</sup>

§ 265. **To whom.** A tender should, in general, be made direct to the creditor.<sup>3</sup> But it may be made to his attorney<sup>4</sup> or authorized agent,<sup>5</sup> although such attorney falsely denies his authority,<sup>6</sup> or such agent has been instructed not to receive it.<sup>7</sup> A tender to an agent is good though it was made on the supposition that he continued to be the party in interest.<sup>8</sup> An attorney, having a demand for collection, wrote the debtor requesting him to pay it at the attorney's office; the debtor subsequently made a tender in the absence of the attorney [450] to his clerk in his office, and it was held good.<sup>9</sup> Such a request of payment gives the debtor a right to treat any person having charge of such office in the absence of the attorney as authorized to receive the money.<sup>10</sup> But a letter from the attorney, demanding payment to him instead of at his office, will not warrant a tender to a writing clerk there who disclaims and has not authority to receive it.<sup>11</sup>

<sup>1</sup> Kortright v. Cady, 21 N. Y. 343.

<sup>2</sup> Welch v. Adams, 152 Mass. 74, 25 N. E. Rep. 34, 9 L. R. A. 244.

<sup>3</sup> Hornby v. Cramer, 12 How. Pr. 490; Smith v. Smith, 2 Hill, 351.

A tender pending an appeal need not be made to the attorney; it is good if made to the opposite party in person. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. Rep. 308.

<sup>4</sup> Salter v. Shove, 60 Minn. 483, 62 N. W. Rep. 1126; Brown v. Mead, 68 Vt. 215, 34 Atl. Rep. 950; Billiot v. Robinson, 13 La. Ann. 529; Wilmot v. Smith, 3 C. & P. 453.

<sup>5</sup> Hargous v. Lahens, 3 Sandf. 213; Goodland v. Blewith, 1 Camp. 477; Anonymous, 1 Esp. 349; Continental Ins. Co. v. Miller, 4 Ind. App. 553, 30 N. E. Rep. 718.

<sup>6</sup> McIniffe v. Wheelock, 1 Gray, 600.

<sup>7</sup> Muffatt v. Parsons, 1 Marsh. 55, 5 Taunt. 307.

<sup>8</sup> Conrad v. Trustees of Grand Grove, 64 Wis. 258, 25 N. W. Rep. 24.

<sup>9</sup> Wilmot v. Smith, 3 C. & P. 453; Kirton v. Braithwaite, 1 M. & W. 310.

<sup>10</sup> Watson v. Hetherington, 1 C. & K. 36; Kirton v. Braithwaite, 1 M. & W. 310.

<sup>11</sup> Id.; Bingham v. Allport, 1 N. & M. 398.

A tender to an attorney with whom a demand is lodged for collection, before suit is brought, is unavailing; if made after suit is commenced the costs must be tendered. Thurston v. Blaisdall, 8 N. H. 367.

In Finch v. Boning, 4 C. P. Div. 143, the judges disagreed as to the

When an instrument is payable at a bank, and is lodged there for collection, the bank becomes the agent of the payee to receive payment. The agency extends no further, and without special authority such agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the consent of the community.<sup>1</sup> A tender may be made to a clerk in a store for goods there purchased, and it will be equivalent to a tender made to the principal, even though prior thereto the claim has been lodged with an attorney for suit. Such clerk can also waive, either by implication or expressly, any objection to the validity of the tender on the ground of its being in bank bills and not in specie.<sup>2</sup> Where there is no general agency to collect, but power simply to receive the sum demanded, a tender of a less sum to such special agent is invalid; as where the plaintiff sent his son to demand a specific amount for an unliquidated claim, it was held that an offer to him of a less sum could not be considered as a tender to the plaintiff.<sup>3</sup> Where an agent of the defendants had been notified not to receive a tender, but to refer the plaintiff to a third person named, of which the plaintiff had notice, the latter was at liberty to seek the person to whom he had been so referred or the defendants, at his election, and could make the tender to either.<sup>4</sup> A tender made to the holder of a note is good though he subsequently assigns it;<sup>5</sup> but it is otherwise as to a tender to the original payee if he has transferred the obligation.<sup>6</sup> A mortgagor or his assignee must make tender to the mortgagee or person claiming under him; it cannot be made to the assignee of the [451] contract secured by the mortgage.<sup>7</sup> Money due to a *cestui que trust* should be tendered to the trustee.<sup>8</sup> But a tender to an executor while in another state, before he had acted or

effect of a disclaimer by a solicitor's clerk who said that the solicitor was out of the office, and he, the clerk, had no instructions.

<sup>1</sup> Ward v. Smith, 7 Wall. 447. See § 231.

<sup>2</sup> Hoyt v. Byrnes, 11 Me. 475.

<sup>3</sup> Chipman v. Bates, 5 Vt. 143.

<sup>4</sup> Hoyt v. Hall, 3 Bosw. 42.

<sup>5</sup> Abshire v. Corey, 113 Ind. 484, 15 N. E. Rep. 685.

<sup>6</sup> Burns v. True, 5 Tex. Civ. App. 74, 24 S. W. Rep. 338.

<sup>7</sup> Smith v. Kelley, 27 Me. 237, 46 Am. Dec. 595.

<sup>8</sup> Chahoon v. Hollenback, 16 S. & R. 425, 16 Am. Dec. 587; Cook v. Kelley, 9 Bosw. 358; Hayward v. Munger, 14 Iowa, 516.

qualified, will not stop interest.<sup>1</sup> If a tender is made to a clerk, agent, or other representative of the creditor, it must be shown that he had authority to receive the money.<sup>2</sup> A debt due jointly to several persons may be tendered to either, but should be pleaded as tendered to all.<sup>3</sup> If no place has been appointed for payment, a tender to the creditor wherever he may be found is good;<sup>4</sup> but if it is made without notice at an unusual or unfit place it may be declined if it is necessary for the creditor to examine the account between him and his debtor.<sup>5</sup>

§ 266. **It must be sufficient in amount.** The tender must include the full amount due. A tender of part of a debt is inoperative.<sup>6</sup> The creditor is not obliged to receive it. The debtor must, at his peril, tender enough; if his tender is less it will be of no avail, though the deficiency is small and oc-

<sup>1</sup> *Todd v. Parker*, 1 N. J. L. 45.

<sup>2</sup> *Hargous v. Lahens*, 3 Sandf. 213; *Goodland v. Blewith*, 1 Camp. 477; *Anonymous*, 1 Esp. 349; *Jewett v. Earle*, 53 N. Y. Super. Ct. 349.

<sup>3</sup> *Wyckoff v. Anthony*, 9 Daly, 417; *Douglas v. Patrick*, 3 T. R. 683; *Southard v. Pope*, 9 B. Mon. 264; *Beebe v. Knapp*, 28 Mich. 53; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. Rep. 115. See *Dawson v. Ewing*, 16 S. & R. 371.

<sup>4</sup> *Slingerland v. Morse*, 8 Johns. 474; *Hunter v. Le Conte*, 6 Cow. 728. See § 214.

<sup>5</sup> *Waldron v. Murphy*, 40 Mich. 668; *Chase v. Welsb*, 45 id. 345, 7 N. W. Rep. 895; *Root v. Bradley*, 49 Mich. 27, 12 N. W. Rep. 896.

<sup>6</sup> *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. Rep. 309; *Helphrey v. Chicago, etc. R. Co.*, 29 Iowa, 480; *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070, 28 So. Rep. 217; *Hoppe & Strub Bottling Co. v. Sacks*, 11 Ohio Ct. Ct. 3; *Elderkin v. Fellows*, 60 Wis. 339, 19 N. W. Rep. 101; *Dixon v. Clark*, 5 C. B. 365; *Baker v. Gasque*, 3 Strobbh. 25; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Boyden v. Moore*, 5 Mass. 365.

In the last case *Parsons, C. J.*, said:

"It is a well-known rule that the defendant must take care at his peril to tender enough; and if he does not, and if the plaintiff replies that there is more due than is tendered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the amount due on the promise; and if not covered by the money tendered, he will have judgment for the balance. . . . In calculating, there may be, and probably must arise, fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. . . . If any sum large enough to be discharged in the current coin of the country is a trifle which, although due, the jury are not obliged to award to the plaintiff, the creditor, it will be difficult to draw a line and say how large a sum must be not to be a trifle. The law fixes no such rule."

Under the code of California a tender is not ineffectual because it is insufficient in amount unless it is objected to for that reason at the time it is made. *Oakland Bank v. Applegarth*, 67 Cal. 86, 7 Pac. Rep. 139, 476.

curred by mistake.<sup>1</sup> If a tender is made after suit it must cover the costs,<sup>2</sup> including the fees of witnesses. "The fact that the plaintiff did not inform the defendant that he had summoned these witnesses was of no importance. If the defendant desired any information as to the amount of the plaintiff's costs from him, he should have inquired, for he knew a suit had been brought and some costs had accrued, and if he chose to make a tender without inquiry, the plaintiff certainly was not in fault.<sup>3</sup> Tender of the amount due on a note must include attorney's fees when the note stipulates for their payment and is in the hands of an attorney for collection, and there is a dispute as to the amount due. But if the payee refuses to give information concerning the fees, or the maker be ignorant of the employment of an attorney, or the tender be refused upon other grounds, and the maker be thereby misled, the court would protect him in making the tender.<sup>4</sup> The necessity of tendering the whole sum due does not require the [452] debtor to tender a sum to cover all demands his creditor may have against him. He may tender for the payment of any one of several debts which is distinct and separable.<sup>5</sup> A tender of a gross sum upon several demands, without des-

<sup>1</sup> Id.

In *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285, a tender was made upon a debt contracted prior to the passage of the legal tender law of 1862; and this tender was made in legal tender notes after the decision in *Hepburn v. Griswold*, 8 Wall. 603, and before the reversal of that case in *Knox v. Lee*, 12 Wall. 457; it was refused because it was not the currency payable. And it was held that the plaintiff was justified in refusing the tender; he had a right to refuse on the decision of the highest judicial tribunal in the land; that decision, for the time being, was the law, and not merely the evidence of it; but it was intimated that if the tender had been kept good it would have been a defense to interest and costs, after the decision of *Knox v. Lee*.

<sup>2</sup> *Smith v. Wilbur*, 35 Vt. 133.

<sup>3</sup> *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. Rep. 51, 45 id. 674. See *Haskell v. Brewer*, 11 Me. 258; *Nelson v. Robson*, 17 Minn. 284.

<sup>4</sup> *Emerson v. White*, 10 Gray, 351; *People v. Banker*, 8 How. Pr. 258; *Collier v. White*, 67 Miss. 133, 6 So. Rep. 618.

But in Connecticut a tender made before the defendant has been served with process is good though costs are not included. *Ashburn v. Poulter*, 25 Conn. 553.

<sup>5</sup> *Wright v. Robinson*, 84 Hun, 172, 32 N. Y. Supp. 463; *North Chicago Street R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Hurt v. Cook*, 151 Mo. 417, 52 S. W. Rep. 396; *East Tennessee, etc. R. Co. v. Wright*, 76 Ga. 532; 2 Par. on Cont. 641.



ignating the amount tendered upon each, is sufficient.<sup>1</sup> Where, however, there are several separate demands sued for, and there has been a tender made of a less sum than the amount demanded for the whole, but not specifically applied to any separable portion of it, it has been held that it cannot be applied in pleading to either.<sup>2</sup> A tender of the amount justly due by the condition of a bond is good although less than the penalty.<sup>3</sup> The penalty is only nominally the debt, and the tender of that sum which if paid would satisfy the bond will be effectual.<sup>4</sup> A tender is not invalidated by being of a larger sum than the amount it is offered to pay or is demanded, even though change is requested, unless objection is made to it on that account.<sup>5</sup>

<sup>1</sup> Johnson v. Cranage, 45 Mich. 14, 7 N. W. Rep. 188; Thetford v. Hubbard, 22 Vt. 440.

<sup>2</sup> Hardingham v. Allen, 5 C. B. 793. If A., B. and C. have a joint demand, and C. has a separate demand against D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. Douglas v. Patrick, 3 T. R. 683. But see Strong v. Harvey, 3 Bing. 304, where it is held that if a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea stating that a certain portion of this sum was tendered for the debt of one.

It was held in Hampshire Manuf. Bank v. Billings, 17 Pick. 89, that a tender of the amount due on a joint and several promissory note by a surety, while an action brought by a holder against the principal was pending, will not discharge the surety from his liability unless he offers to indemnify the holder against the costs of such action.

<sup>3</sup> Tracy v. Strong, 2 Conn. 659.

<sup>4</sup> See Fraser v. Little, 13 Mich. 195; Spencer v. Perry, 18 Mich. 394.

<sup>5</sup> North Chicago Street R. Co. v. Le Grand Co., 95 Ill. App. 435.

In Dean v. James, 4 B. & Ad. 546, it was held that a tender of 20*l.* 9*s.* 6*d.* in bank notes is sufficient to support a plea of tender of 20*l.* Taunton, J., referring to Watkins v. Robb, 2 Esp. 710, said: "There the defendant tendered a 5*l.* note and demanded 6*d.* change, which the defendant was not bound to give." Betterbee v. Davis, 3 Camp. 71. Littledale, J., said: "This case falls within the third resolution in Wade's Case, 5 Co. 115, that if a man tender more than he ought to pay it is good, for *omne majus continet in se minus*, and the other is bound to accept so much of it as is due to him." The argument against the tender was that a subsequent demand must be of the specific sum tendered, and if that sum is more than the plaintiff's demand, it would be inapplicable. Referring to this Littledale, J., continues: "As to replying a demand it is not the plaintiff's business to demand more than is actually due; it is enough if in his replication he admits that the sum due was tendered, but

[453] § 267. Same subject. The creditor is entitled to payment in money made legal tender by law, and the debtor has a right to make payment in that currency. Debts made payable in the denominations of the legal tender currency are solvable in that currency at par, without regard to when or where they were contracted, or the relative value of [454] the denominations in that currency at and after the

alleges that he afterwards demanded that and it was refused."

Lord Abinger said in *Bevans v. Rees*, 5 M. & W. 306: "I am prepared to say that if the creditor knows the amount due to him, and is offered a larger sum, and without any objection of a want of change makes quite a collateral objection, that will be a good tender." *Black v. Smith*, Peake, 88; *Cadman v. Lubbock*, 5 D. & Ry. 289; *Hubbard v. Chenango Bank*, 8 Cow. 89; *Patterson v. Cox*, 25 Ind. 261; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546; *Astley v. Reynolds*, 2 Str. 916; *Strong v. Harvey*, 3 Bing. 304; *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365.

*Cadman v. Lubbock*, 5 D. & Ry. 289. Where the defendant, who owed the plaintiff 108*l.* for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount sent a person to the attorney, who told such attorney that he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 150 sovereigns on a desk, out of which he desired the attorney to take what was due for such principal and interest, but the attorney refused to do so, unless a shop account due from the plaintiff to the defendant was fixed at a certain amount, held to be a good tender. *Bevans v. Rees*, 5 M. & W. 306. A tender has been held vitiated by delivering a

counter-claim at the same time. Thus, where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said you must go to my attorney: Held, not a good tender to an action for the 6*l.* 17*s.* 6*d.* *Brady v. Jones*, 2 D. & R. 305; and see *Holland v. Phillips*, 6 Esp. 46. See, also, *Laing v. Meader*, 1 C. & P. 257.

In *Saunders v. Frost*, 5 Pick. 259, 269, there was a tender of a mortgage debt which was not due, and bearing interest, and of which only interest was due. Objection was made by counsel that the tender was made of a debt not due. The tender was of a sum equal to the interest and the principal. Parker, C. J., said: "But it appears to us that, in order to avail himself of this objection, the defendant ought to have shown a willingness to take what was due, and to have stated that he claimed to hold possession only for the non-payment of interest." *Odom v. Carter*, 36 Tex. 281.

A tender of \$5 by a street-car passenger who has no smaller money is reasonable, and his ejection from the car thereafter is unlawful. *Barrett v. Market Street Cable R. Co.*, 81 Cal. 296, 22 Pac. Rep. 859, 15 Am. St. 61, 6 L. R. A. 336.

contract was made. The legal tender currency for the time being, when the contract is performed or enforced, is the currency applicable to it.<sup>1</sup> If money be payable in the legal currency of another country, the legal rather than the market equivalent is the amount to be paid. A contract to pay in "dollars" may require payment in either coin or legal tender currency provided by the government, according to the intention of the parties. Treasury notes, commonly called "greenbacks," are the currency payable, unless the contract itself indicates the intention that the debt be paid in coin.<sup>2</sup> A contract to pay in "dollars" in gold and silver is a contract for the direct payment of money; neither bullion, gold dust, gold and silver bars, old spoons and rings, are a proper tender in satisfaction.<sup>3</sup> But current bank notes, which pass as money, offered in payment and not objected to on that ground, will constitute a good tender.<sup>4</sup> When a debtor tenders a bank check in payment of a debt, and the creditor expressly waives all objection to that mode of payment and only objects to the amount, it is good;<sup>5</sup> but not, as a rule, otherwise.<sup>6</sup> If numer-

<sup>1</sup> Story on Prom. Notes, § 390 and note; *George v. Concord*, 45 N. H. 434; *Wood v. Bullens*, 6 Allen, 516; *Pong v. De Lindsey*, 1 Dyer, 82a; *Dopley v. Smith*, 13 Wall, 604; *Legal Tender Cases*, 12 id. 457; *Trebilcock v. Wilson*, id. 687; *Vorges v. Giboney*, 38 Mo. 458; *Warnibold v. Schlichting*, 16 Iowa, 243; *Murray v. Harrison*, 47 Barb. 484; *Wilson v. Morgan*, 4 Robert. 58; *Strong v. Farmers'*, etc. Bank, 4 Mich. 350; *Wills v. Allison*, 4 Heisk. 385; *Bond v. Greenwald*, id. 453; *Caldwell v. Craig*, 22 Gratt. 340.

<sup>2</sup> *Trebilcock v. Wilson*, 12 Wall. 687.

<sup>3</sup> *Hart v. Flynn*, 8 Dana, 190. See *Lang v. Waters*, 47 Ala. 624; *McCune v. Erfort*, 43 Mo. 134.

<sup>4</sup> *Brown v. Simons*, 44 N. H. 475; *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263; *Noe v. Hodges*, 3 Humph. 162; *Seawell v. Henry*, 6 Ala. 226; *Cummings v. Putnam*, 19 N. H. 569;

*Williams v. Rorer*, 7 Mo. 556; *Cooley v. Weeks*, 10 Yerg. 141; *Snow v. Perry*, 9 Pick. 539; *Wheeler v. Knaggs*, 8 Ohio, 169; *Fosdick v. Van Husan*, 21 Mich. 567; *Curtiss v. Greenbanks*, 24 Vt. 536; *Petrie v. Smith*, 1 Bay. 115; *Brown v. Dysinger*, 1 Rawle, 408. See *Ward v. Smith*, 7 Wall, 447.

<sup>5</sup> *Dale v. Richards*, 21 D. C. 312; *Jennings v. Mendenhall*, 7 Ohio St. 258.

The court say in the last case cited: "On a somewhat extensive examination of the cases, it seems to us that mere silence is held to be a waiver of objection in the case of current bank notes, for the reason that they constitute the common currency of the country, and are by all classes paid out and received as money, which is a reason that does not fully apply to bank checks. All the cases, however, proceed on the

<sup>6</sup> *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. Rep. 288.

ous payments have been made by the debtor to the creditor by checks, and no objection to them has been raised, a tender by check is sufficient, though it would be otherwise if the creditor informed his debtor of an objection to continue receiving them.<sup>1</sup> If a check is objected to on any other ground than that it is not money the effect of the tender can only be got rid of by a personal demand and a refusal to pay.<sup>2</sup> Where a note is [455] payable to a bank in which the debtor has a deposit, his check on such bank is a good tender;<sup>3</sup> but a note or other obligation of the creditor is not a legal tender. A tender for part of an entire demand and set-off for the residue cannot be pleaded.<sup>4</sup>

§ 268. **How made.** As a general rule the money must be actually produced and placed within the power of the creditor to receive it, unless he dispense with its production by express declaration or other equivalent act.<sup>5</sup> A mere verbal offer to

principle that where all objection to the proposed medium of payment is waived, the tender is good, though not made in coin; and the only difference between them is on the question as to what shall be held to be conclusive of such waiver."

<sup>1</sup>Wright v. Robinson, 84 Hun, 172, 32 N. Y. Supp. 463; Mitchell v. Vermont Copper Mining Co., 67 N. Y. 280; McGrath v. Gegner, 77 Md. 331, 26 Atl. Rep. 502, 39 Am. St. 415.

<sup>2</sup>Daly v. Egan, 12 Vict. L. R. 81.

<sup>3</sup>Shipp v. Stacker, 8 Mo. 145.

"Lawful current money" of a state is construed to mean money issued by congress. Wharton v. Morris, 1 Dall. 124; McChord v. Ford, 3 T. B. Mon. 166. "Current lawful money" is the same. Lee v. Biddis, 1 Dall. 175. But "currency," where bank notes are the only currency, does not mean money. McChord v. Ford, *supra*; Lange v. Kohne, 1 McCord, 115.

A tender in confederate money was held not good, although it was at the time the circulating currency in the community. Graves v. Hard-

esty, 19 La. Ann. 186. See Parker v. Broas, 20 id. 167; but see, also, Phillips v. Gaston, 37 Ga. 16; Tate v. Smith, 70 N. C. 685.

<sup>4</sup>Cary v. Bancroft, 14 Pick. 315, 25 Am. Dec. 393; Hallowell & A. Bank v. Howard, 13 Mass. 235; Searles v. Sadgrove, 85 Eng. C. L. 639, 5 El. & Bl. 639.

<sup>5</sup>Pinney v. Jorgenson, 27 Minn. 26, 6 N. W. Rep. 376; Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 N. W. Rep. 44; Te Poel v. Shutt, 57 Neb. 592, 78 N. W. Rep. 288; Brown v. Gilmore, 8 Me. 107, 22 Am. Dec. 223; Ladd v. Patten, 1 Cranch C. C. 263; Thomas v. Evans, 10 East, 101; Liebrandt v. Myron Lodge, 61 Ill. 81; Dickinson v. Shee, 4 Esp. 68; Walker v. Brown, 12 La. Ann. 266; Sands v. Lyon, 18 Conn. 18; Strong v. Blake, 46 Barb. 227; Matheson v. Kelly, 24 Up. Can. C. P. 598; Holmes v. Holmes, 12 Barb. 137; Bakeman v. Pooler, 15 Wend. 637; Breed v. Hurd, 6 Pick. 356; Gilmore v. Holt, 4 id. 258; Eastland v. Longshorn, 1 N. & McC. 194; Southworth v. Smith, 7 Cush. 391; Lohman v. Crouch, 19 Gratt. 331;

pay a certain sum does not constitute a tender.<sup>1</sup> The cases concur in the foregoing rule, but differ somewhat in its application. Where there is a verbal offer of a particular [456] sum, and the creditor insists on more being due in such manner as amounts to a declaration that the offered sum would not be received, the actual production of the money is not necessary.<sup>2</sup> The immediate departure of the creditor on such an offer being made, or any intentional evasion of the debtor, would seem to be equivalent to an express refusal of it, and equally to excuse the production of the money.<sup>3</sup> So on a verbal

Dunham v. Jackson, 6 Wend. 22; McIntire v. Clark, 7 id. 330; Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469. See Champion v. Joslyn, 44 N. Y. 653; Hill v. Place, 5 Abb. Pr. (N. S.) 18, 7 Robert. 389; Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32; Slingerland v. Morse, 8 Johns. 474; Blight v. Ashley, 1 Pet. C. C. 15; Thayer v. Brackett, 12 Mass. 450; Cary v. Bancroft, 14 Pick. 315, 25 Am. Dec. 393.

<sup>1</sup> Shank v. Groff, 45 W. Va. 543, 32 S. E. Rep. 248; De Wolfe v. Taylor, 71 Iowa, 648, 33 N. W. Rep. 154; Eastman v. Rapids, 21 Iowa, 590; Camp v. Simon, 34 Ala. 126; Steele v. Biggs, 22 Ill. 643; Hornby v. Cramer, 12 How. Pr. 490; Sheredine v. Gaul, 2 Dall. 190; Bacon v. Smith, 2 La. Ann. 441; Hunter v. Warner, 1 Wis. 141. See Harris v. Mulock, 9 How. Pr. 402; Hill v. Place, 7 Robert. 389.

<sup>2</sup> Smith v. Old Dominion Building & Loan Ass'n, 119 N. C. 257, 26 S. E. Rep. 40; Bradford v. Foster, 87 Tenn. 11, 9 S. W. Rep. 195; Johnson v. Garlichts, 63 Mo. App. 578; Graham v. Frazier, 49 Neb. 90, 68 N. W. Rep. 367; Bender v. Bean, 52 Ark. 132, 12 S. W. Rep. 180, 241; Pinney v. Jorgenson, 27 Minn. 26, 6 N. W. Rep. 376; Black v. Smith, Peake, 88; Jackson v. Jacob, 3 Bing. N. C. 869; Sands v. Lyon, 18 Conn. 18; Read v. Goldring, 2 M. & S. 86; Finch v. Brook, 1 Scott, 70; Danks, *Ex parte*, 2 De Gex,

M. & G. 936; Murray v. Roosevelt, Anth. 101; Vaupell v. Woodward, 2 Sandf. Ch. 143; Stone v. Sprague, 20 Barb. 509; Dana v. Fiedler, 1 E. D. Smith, 463; Slingerland v. Morse, 8 Johns. 474; Everett v. Saltus, 15 Wend. 474; Warren v. Mains, 7 Johns. 476; State v. Spicer, 4 Houst. 100; Hazard v. Loring, 10 Cush. 267; Strong v. Blake, 46 Barb. 227; Appleton v. Donaldson, 3 Pa. 381.

In Dunham v. Jackson, 6 Wend. 22, it was held that a hesitating refusal, based on a claim of more than is due, will not dispense with the actual production of the money. Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469; Harding v. Davies, 2 C. & P. 77.

<sup>3</sup> Continental Ins. Co. v. Miller, 4 Ind. App. 553, 30 N. E. Rep. 718; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. Rep. 340, 16 Am. St. 315, 7 L. R. A. 214; West v. Averill Grocery Co., 109 Iowa, 488, 80 N. W. Rep. 555; Hurt v. Cook, 151 Mo. 417, 52 S. W. Rep. 396; Schayer v. Commonwealth Loan Co., 163 Mass. 322, 39 N. E. Rep. 1110; Gilmore v. Holt, 4 Pick. 257; Southworth v. Smith, 7 Cush. 391; Judd v. Ensign, 6 Barb. 258; Houbie v. Volkening, 49 How. Pr. 169; Sands v. Lyon, 18 Conn. 18; Raines v. Jones, 4 Humph. 490; Littel v. Nichols, Hard. 66; Holmes v. Homes, 12 Barb. 137. But see Leatherdale v. Sweepstone, 3 C. & P. 342; Knight v. Ab-

offer of a specified sum in legal tender notes in which the debt might be paid, a declaration by the creditor that he would receive nothing but gold or silver would dispense with the actual production of the offered money.<sup>1</sup> An absolute refusal to receive the amount, or, in case of mutual executory contracts, to do the act in consideration of which it is to be paid, is a waiver of production.<sup>2</sup> But the debtor must have the money to immediately comply with his offer; having it in a bag is [457] no objection.<sup>3</sup> In some cases it is held that such a refusal will not dispense with the actual production of the money; that there must be some declaration or equivalent act to the effect that the debtor need not offer it.<sup>4</sup> The sight of the money may tempt the creditor to accept it.<sup>5</sup> The question whether the production has been dispensed with is for the jury; and if they find the facts specially and do not find the fact of dispensation, the court will not infer it.<sup>6</sup> The money must be actually at hand and ready to be produced immediately if it should be accepted. It is not enough that a third person has it on the spot and is willing to loan it, unless he actually consents to do so for the purpose of the tender.<sup>7</sup> At

bott, 30 Vt. 577; Thorne v. Mosher, 20 N. J. Eq. 267, 36 Am. Rep. 542.

<sup>1</sup> Chinn v. Bretches, 42 Kan. 316, 22 Pac. Rep. 426; Hanna v. Ratekin, 43 Ill. 462; Hayward v. Munger, 14 Iowa, 516; Wynkoop v. Cowing, 21 Ill. 570.

<sup>2</sup> Murray v. Roosevelt, Anth. 101; Hazard v. Loring, 10 Cush. 267; Vaupell v. Woodward, 2 Sandf. Ch. 143; Strong v. Blake, 46 Barb. 227; Stone v. Sprague, 20 id. 509; Appleton v. Donaldson, 3 Pa. 381; Dana v. Fiedler, 1 E. D. Smith, 463; Slingerland v. Morse, 8 Johns. 474; Everett v. Saltus, 15 Wend. 474; Warren v. Mains, 7 Johns. 476; Thompson v. Lyon, 40 W. Va. 78, 20 S. E. Rep. 812.

<sup>3</sup> Conway v. Case, 23 Ill. 127; Breed v. Hurd, 6 Pick. 356; Davis v. Stonestreet, 4 Ind. 101; Harding v. Davies, 2 C. & P. 77; Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32; Sucklinge v. Coney, Noy, 74; Behaly v. Hatch,

Walk. (Miss.) 369, 12 Am. Dec. 570. Compare Sharp v. Todd, 38 N. J. Eq. 234.

<sup>4</sup> Thomas v. Evans, 10 East, 101; Douglas v. Patrick, 3 T. R. 683; Dickinson v. Shee, 4 Esp. 68; Finch v. Brook, 1 Bing. N. C. 253; Leatherdale v. Sweepstone, 3 C. & P. 342; Firth v. Purvis, 5 T. R. 432; Kraus v. Arnold, 7 Moore, 59; Brown v. Gilmore, 8 Me. 107, 22 Am. Dec. 223; Bakeman v. Pooler, 15 Wend. 637.

<sup>5</sup> Finch v. Brook, *supra*.

<sup>6</sup> Id.; 2 Greenlf. Ev., § 603.

The burden of proving readiness and ability to pay is upon the debtor. Ladd v. Mason, 10 Ore. 308; Park v. Wiley, 67 Ala. 310.

<sup>7</sup> Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469; Bakeman v. Pooler, 15 Wend. 637; Breed v. Hurd, 6 Pick. 356; Eastland v. Longshorn, 1 N. & McC. 194.

an interview between the plaintiff and the defendant the latter was willing to pay £10, and a third person offered to go upstairs and fetch that sum, but was prevented by the plaintiff saying "he cannot take it." Such offer was held a good tender.<sup>1</sup> A tender made by holding an unstated sum in hand, [458] peremptorily rejected without inquiry as to amount, is good.<sup>2</sup>

<sup>1</sup> *Harding v. Davies*, 2 C. & P. 77. But in *Kraus v. Arnold*, 7 Moore, 59, the defendant ordered A. to pay the plaintiff £7 12s., and the clerk of the plaintiff demanded £8, on which A. said he was only ordered to pay £7 12s., which sum was in the hands of B., and B. put his hand to his pocket with a view to pulling out his pocket-book to pay £7 12s., but did not do so, by the desire of A.; but B. could not say whether he had that sum about him, but swore he had it in his house, at the door of which he was standing at the time. Held, not a legal tender, because the money was not produced.

And in *Glasscott v. Day*, 5 Esp. 48, it was held the tender was not good because the money was not in sight; the witness supposed it was in the desk, but never saw it produced; and it did not appear that if the creditor had been willing to accept the money it could be immediately paid; the money should be at hand and capable of immediate delivery.

In *Breed v. Hurd*, 6 Pick. 356, a witness told the plaintiff that the defendant had left money with him to pay his bill, and that if the plaintiff would make it right by deducting a certain sum he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; he swore that he believed, but did not know, that there was money enough in his desk; but if there was not, he would have obtained it in five minutes if the plaintiff would have made the deduction; but the plaintiff replied

that he would deduct nothing. Held, not a tender.

<sup>2</sup> *State v. Spicer*, 4 Houst. 100. It appeared in this case that the parties met, and the debtor, in his wagon, which stopped on meeting the creditor, said: "I've got the money to pay you," specifying the claim, and put his hand into his pocket to take out the bag which contained the money; while he was doing this the creditor said, "I want nothing to do with such a cut-throat as you," and walked rapidly away. The jury found that the debtor was thereby prevented from producing the money and offering it to the creditor, and it was held a good tender. *Sands v. Lyon*, 18 Conn. 18.

In *Knight v. Abbott*, 30 Vt. 577, the defendant, desiring to make a tender, said to the plaintiff as he was passing in a wagon, "I want to tender you this money for labor you have done for me," at the same time holding a sum in his hand equal to his indebtedness, but not mentioning any amount; the plaintiff did not reply, nor stop his team. Held, not a good tender.

In *Thorne v. Mosher*, 20 N. J. Eq. 257, A. offered to pay money to B., holding her purse in her hand in sight of B., who saw the purse, but not the bills. A. opened the purse, and was in the act of taking out the bills, but stopped on account of the refusal of B. to receive the money. Held, that the offer was neither payment nor tender, but the refusal was an excuse for not making a tender.

To make a valid tender under a statute providing that an offer in writing to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money, the party must have the ability to produce the money, and must act in good faith. Such an offer does not deprive the creditor of the right to a reasonable time in which to ascertain the amount due, and to determine whether he will accept.<sup>1</sup>

**§ 269. Where to be made.** If a debt is payable at a particular place the creditor has a right to receive the money there.<sup>2</sup> When payable at a bank, the designation of place imports a stipulation that the holder will have the instrument on which the money is payable at the bank to receive payment, and that the debtor will have the funds there to pay it; and it is the general usage in such cases to lodge the instrument with the bank for collection. If the instrument is not there lodged, and the debtor is there at maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either in costs of suit or interest for the delay.<sup>3</sup> Having money, however, in a bank where a note is payable is not a tender unless it is in some way appropriated to the note.<sup>4</sup> A tender to the cashier [459] of the amount of a note payable at his bank, coupled with a demand of the note, is not good, it not being there at the time, and the money not being deposited nor afterwards offered.<sup>5</sup> Where no place of payment is appointed the debt is payable anywhere; and it is the duty of the debtor to seek the creditor if within the state.<sup>6</sup> If the creditor is without the

<sup>1</sup> Hyams v. Bamberger, 10 Utah, 1, 36 Pac. Rep. 202.

<sup>2</sup> United States v. Gurney, 4 Cranch, 333; Adams v. Rutherford, 13 Ore. 78, 18 Pac. Rep. 896. See § 214.

<sup>3</sup> Ward v. Smith, 7 Wall, 447; Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. Rep. 52.

<sup>4</sup> Myers v. Byington, 34 Iowa, 205.

<sup>5</sup> Balme v. Wambaugh, 16 Minn. 116; Hill v. Place, 7 Robert. 389. See Rowe v. Young, 2 Brod. & Bing. 165; Bacon v. Dyer, 12 Me. 19; Wallace v. McConnell, 13 Pet. 136.

<sup>6</sup> Littell v. Nichols, Hardin, 66;

Houbie v. Volkening, 49 How. Pr. 169; Harris v. Mulock, 9 id. 402.

In the last case it appeared that the creditor went to the debtor's office to receive payment. While in the act of counting one of several packages of bank bills delivered to him by the debtor as payment, he suddenly left the office by reason of insulting language addressed to him by the latter. It was held that the money not being current coin, it would not be a tender if the creditor objected to it for that reason; therefore to constitute that money a tender, the



state the tender is dispensed with, and no rights are lost by the debtor's inability to make it.<sup>1</sup> The publication of a notice of a change in the place designated for payment of the principal of bonds does not affect their holders without actual notice of such change.<sup>2</sup>

§ 270. **Must be unconditional.** A tender must be unconditional,<sup>3</sup> or at least cannot be clogged by any condition to which the creditor can have reasonable objection;<sup>4</sup> so that if he takes the money and there is more due, he may still bring an action for the residue.<sup>5</sup> An offer of a certain sum in full of a [460] demand is not a good tender.<sup>6</sup> But a tender is not vitiated by being an offer of payment under protest. If the debtor abso-

debtor was obliged to give the creditor time sufficient to ascertain whether the money was such as he would be willing to receive instead of coin; and the creditor having cause to leave on account of the insulting language before such examination was completed, the tender was not sufficient; the debtor must seek the creditor for that purpose. See *Mathis v. Thomas*, 101 Ind. 119; § 214.

<sup>1</sup> *Buckner v. Finley*, 2 Pet. 587; *Smith v. Smith*, 25 Wend. 405; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417; *Gill v. Bradley*, 21 Minn. 15; *Gage v. McSweeney*, 74 Vt. 370, 52 Atl. Rep. 969.

<sup>2</sup> *Kelley v. Phenix Nat. Bank*, 17 App. Div. 496, 45 N. Y. Supp. 533. See *Williamson County v. Farson*, 101 Ill. App. 328, 199 Ill. 71, 64 N. E. Rep. 1086.

<sup>3</sup> *Rose v. Duncan*, 49 Ind. 269; *Jennings v. Major*, 8 C. & P. 61; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Wagenblast v. McKean*, 2 Grant's Cas. 393; *Cothren v. Scanlan*, 34 Ga. 555; *Pulsifer v. Shepard*, 36 Ill. 513; *Shaw v. Sears*, 3 Kan. 242; *Hunter v. Warner*, 1 Wis. 141; *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129.

<sup>4</sup> *Connecticut Mut. L. Ins. Co. v.*

*Stinson*, 86 Ill. App. 668; *Bevans v. Rees*, 5 M. & W. 306; *Richardson v. Jackson*, 8 id. 298; *Wheelock v. Tanner*, 39 N. Y. 481; *Foster v. Drew*, 39 Vt. 51; *Dedekam v. Vose*, 3 Blatchf. 44. See *Moynahan v. Moore*, 9 Mich. 9; *Hepburn v. Auld*, 1 Cranch, 321.

<sup>5</sup> *Moore v. Norman*, 52 Minn. 83, 53 N. W. Rep. 809, 38 Am. St. 526, 18 L. R. A. 359; *Beckman v. Birchard*, 48 Neb. 805, 67 N. W. Rep. 784; *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. Rep. 288; *Mitchell v. King*, 6 C. & P. 237; *Hartings v. Thorley*, 8 id. 573; *Jennings v. Major*, id. 61; *Peacock v. Dickerson*, 2 id. 51, n.; *Benkard v. Babcock*, 27 How. Pr. 391; *Henwood v. Oliver*, 1 G. & D. 25, 1 Q. B. 409; *Bowen v. Owen*, 11 id. 130; *Wood v. Hitchcock*, 20 Wend. 47; *Loring v. Cooke*, 3 Pick. 48; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

<sup>6</sup> *Shiland v. Loeb*, 58 App. Div. 565, 69 N. Y. Supp. 11; *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. Rep. 158; *Tompkins v. Batie*, 11 Neb. 147, 7 N. W. Rep. 747, 38 Am. Rep. 361; *Boulton v. Moore*, 14 Fed. Rep. 922; *Shuck v. Chicago, etc. R. Co.*, 73 Iowa, 333, 35 N. W. Rep. 429; *Griffith v. Hodges*, 1 C. & P. 419; *Strong v. Harvey*, 3 Bing. 304; *Cheminant v. Thornton*, 2 C. & P. 50;

lutely offers to pay he does not vitiate the offer by protesting.<sup>1</sup> There have been some intimations that even asking a receipt [461] would vitiate a tender; and it is probable the require-

Thayer v. Brackett, 12 Mass. 450; Mitchell v. King, 6 C. & P. 237; Wood v. Hitchcock, 20 Wend. 47.

In the last case Cowen, J., said: "It was clearly a tender to be accepted as the whole amount due, which is holden to be bad by all the books. The tender was also bad because the defendant would not allow that he was ever liable for the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. He must also avoid all counter-claim, as of set-off against part of the debt due. That this defendant intended to impose the terms, or raise the inference that the acceptance of the money should be in full and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter-claim. It is not of the nature of a tender to make conditions, but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt or an intimation that it is expected, as by asking, 'Have you got a receipt?' will vitiate. The demand of a receipt in full would of course be inadmissible."

The reason of this rule is obvious where the debtor does not in fact tender all that is due; for if a debtor tenders a certain sum as all that is due, and the creditor receives it, under these circumstances it might compromise his rights in seeking to

recover more; but if the same sum was tendered *unconditionally*, no such effect would follow. Sutton v. Hawkins, 8 C. & P. 259. The reason why a tender has so often been held invalid when a receipt in full has been demanded seems not to have been merely because a receipt was asked for, but rather because a part was offered in full payment. See Sanford v. Bulkley, 30 Conn. 344.

In Holton v. Brown, 18 Vt. 224, 46 Am. Dec. 148, it was held that a tender to pay a note is vitiated by demand of it, and refusing to accept a discharge of the mortgage and a receipt for the payment, the holder not being able at the time to find the note. See Wilder v. Seelye, 8 Barb. 408; Story on Prom. Notes, § 106 *et seq.*; §§ 243, 244; Balme v. Wambaugh, 16 Minn. 116.

In Robinson v. Ferreday, 8 C. & P. 752, it was held that a tender was not vitiated by the person making it saying, at the time, that it was all that the debtor considered was due; but if he offers the sum "as all that is due," it is different. Sutton v. Hawkins, 8 C. & P. 259; Field v. Newport, etc. R. Co., 3 H. & N. 409; Thorpe v. Burgess, 8 Dowl. P. C. 603. And in Bowen v. Owen, 11 Q. B. 180, a tenant sent to his landlord 26l., with a letter in these words: "I have sent with the bearer 26l. to settle one year's rent of Nant-y-pair." The landlord refused to take it, saying that more was due. Held, a good tender.

<sup>1</sup> Manning v. Lunn, 2 C. & K. 13; Scott v. Uxbridge & R. R. Co., L. R. 1 C. P. 596; Sweny v. Smith, L. R. 7 Eq. 324. But see Wood v. Hitchcock, 20 Wend. 47, quoted from in the preceding note.

ment to give one stamped would have that effect;<sup>1</sup> but it is believed that the tenderer may ask a simple receipt for what is paid.<sup>2</sup> At all events, if the creditor refuse the tender wholly on the ground of more being due he cannot afterwards object thereto because the debtor required a receipt.<sup>3</sup> A tender, however, which is accompanied by a demand for a receipt in full is conditional, and of course invalid.<sup>4</sup> A tender of money in [462]

An offer to the effect that "I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay," if accompanied by the money (which is not necessary in Iowa) is not a good tender. *Kuhns v. Chicago, etc. R. Co.*, 65 Iowa, 528, 22 N. W. Rep. 661.

<sup>1</sup> *Laing v. Meader*, 1 C. & P. 257. See *Ryder v. Townsend*, 7 D. & R. 119.

<sup>2</sup> See 2 Par. on Cont. 645, note *m*; *Jones v. Arthur*, 8 Dowl. P. C. 442; *Bowen v. Owen*, 11 Q. B. 130.

Under the code of California the debtor may demand a receipt. *Ferreira v. Tubbs*, 125 Cal. 687, 58 Pac. Rep. 308. And so in Georgia; but nothing more than a receipt can be demanded. *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. Rep. 560.

A tender of taxes may be conditioned upon the giving of a receipt, the statute requiring that the officer do that. *State v. Central Pacific R. Co.*, 21 Nev. 247, 22 Pac. Rep. 237.

<sup>3</sup> *Richardson v. Jackson*, 8 M. & W. 298; *Cole v. Blake, Peake*, 179.

<sup>4</sup> *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. Rep. 158; *Frost v. Yonkers Savings Bank*, 70 N. Y. 558, 26 Am. Rep. 627; *Bowen v. Owen*, 11 Q. B. 130; *Griffith v. Hodges*, 1 C. & P. 419; *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gow, 213; *Foord v. Noll*, 2 Dowl. (N. S.) 617; *Finch v. Miller*, 5 C. B. 428; *Sanford v. Bulkley*, 30 Conn. 344; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42; *Perkins v. Beck*, 4 Cranch C. C. 68; *Hart v. Flynn*, 8

*Dana*, 190; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Siter v. Robinson*, 2 Bailey, 274; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 Am. Dec. 569; *Wood v. Hitchcock*, 20 Wend. 47; *Eddy v. O'Hara*, 14 id. 221; *Clark v. Mayor*, 1 Keyes, 9; *Thayer v. Brackett*, 12 Mass. 450; *Wagenblast v. McKean*, 2 Grant's Cas. 393; *Pulsifer v. Shepard*, 36 Ill. 513; *Cothran v. Scanlan*, 34 Ga. 555; *Shaw v. Sears*, 3 Kan. 242; *Hunter v. Warner*, 1 Wis. 141; *Rose v. Duncan*, 49 Ind. 269.

Where a tender was made in "greenbacks," and refused because payment in coin was demanded, it was considered a valid tender, if the court should be of opinion that the debtor was entitled to pay in such money. The money was paid into court, to be drawn only on its order "or by the plaintiff, if he shall accept the same as tendered." The plaintiff obtained an order of the court and drew the money, and the order recited that he should not be prejudiced by his acceptance and appropriation of the amount. *Lindsay, J.*, said: "So long as the legal tender notes remained in the hands of the court, or its agent, the Farmers' Bank, they constituted a standing and continuous offer to Robb, which he had the option at any time to accept 'as tendered.' But he could not of his own volition take out and appropriate such notes upon any other conditions than those upon which the tender was made. Nor had the court the power to change or modify these conditions. If it should finally

payment of a debt, to be available, must be without qualification; that is, there must not be anything raising an implication that the debtor intends to cut off or bar a claim for any amount beyond the sum offered.<sup>1</sup> A tender of money to pay negotiable paper may be so far conditional as to be accompanied by a demand for its surrender,<sup>2</sup> unless the creditor asserts in good

be adjudged that the tender was sufficient in law, the appellant would be entitled to his costs, and the title to the money on deposit would be vested in Robb. Upon the other hand, if the court should adjudge that Robb was entitled to have his note paid in gold coin, a judgment specifically enforcing his contract would be rendered, and Wells would have the right to withdraw from the hands of the court the legal tender notes on deposit. The rule is different where there is no controversy as to the character of the money tendered; but where the plaintiff claims a larger amount than the defendant concedes to be due, in such cases the tender establishes the liability of the party sued for the amount tendered, and the plaintiff has a right to accept that amount as a payment *pro tanto*, and continue the litigation for the balance claimed, he being responsible for costs subsequently accruing, in case he fails to recover judgment for such balance or some part thereof. Here it was all the time in the power of Robb to waive his objection to the character of the money tendered and accept it in satisfaction of his debt; but as it was lawful money, as held recently by the supreme court of the United States (*Knox v. Lee and Parker v. Davis*), it was not within the power of the circuit court to permit him to take possession of it as property, and account to appellant for its value in coin, nor to compel the latter to pay it out upon any debt for less than its face value. As the unauthorized

order of the court under which Robb obtained possession of the money tendered was made at his instance, and contrary to the objections of his debtor, he occupies no better attitude than he would have done had he withdrawn the money from the bank, as he had a right to do, under the order directing the deposit to be made. He must be held to have waived objection to the character of the money tendered, and to have accepted it as a payment of his debt." *Wells' Adm'r v. Robb*, 9 Bush, 26.

<sup>1</sup> *Wood v. Hitchcock*, 20 Wend. 47; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579; *Wilder v. Seelye*, 8 id. 408; *Sanford v. Bulkley*, 30 Conn. 344; *Perkins v. Beck*, 4 Cranch C. C. 68; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 Am. Dec. 569; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Hart v. Flynn*, 8 Dana, 190; *Eddy v. O'Hara*, 14 Wend. 221; *Clark v. Mayor*, 1 Keyes, 9; *Cheminant v. Thornton*, 2 C. & P. 50; *Strong v. Harvey*, 3 Bing. 304; *Mitchell v. King*, 6 C. & P. 237; *Brady v. Jones*, 2 Dow. & Ry. 305; *Benkard v. Babcock*, 27 How. Pr. 391; *Rose v. Duncan*, 49 Ind. 269; *Finch v. Miller*, 5 C. B. 428; *Sutton v. Hawkins*, 8 C. & P. 259.

<sup>2</sup> *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. Rep. 155; *Strafford v. Welch*, 59 N. H. 46; *Cutler v. Goold*, 43 Hun, 516; *Wilder v. Seelye*, 8 Barb. 408; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Smith v. Rockwell*, 2 Hill, 482; *Hansard v. Robinson*, 7 B. & C. 90. See *Story on Bills*, §§ 448-9; *Chitty on*

faith that the sum tendered is insufficient.<sup>1</sup> The debtor may require that a pledge be surrendered.<sup>2</sup> The rule as to such paper is exceptional, to withdraw it from circulation and for recourse to other parties.

The general doctrine in respect to tender is that no condition can be annexed which, by acceptance, would preclude any question which would otherwise be open to the creditor. He should be at liberty to accept the tender, and to say he does not take it in full satisfaction of his demand; or that he does not [463] forego any right by its acceptance except to deny that so much was paid, and such benefits to the tenderer as are consequent by legal intendment. The party making the tender should be content to allow the creditor to take the money, and get more if the jury find him entitled to it; or to assert any other right consistent with the mere acceptance of the money, and applying it to the subject.<sup>3</sup> If, however, there is no dispute as to the

Bills, 423; Story on Prom. Notes, §§ 106, 112, 143, 244; Storey v. Krewson, 55 Ind. 397, 23 Am. Rep. 668; Dooley v. Smith, 13 Wall. 604.

<sup>1</sup> Moore v. Norman, 52 Minn. 83, 53 N. W. Rep. 809, 38 Am. St. 526, 18 L. R. A. 359.

<sup>2</sup> Cass v. Higebotam, 100 N. Y. 253, 3 N. E. Rep. 189; Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. 435, 14 Pac. Rep. 369, 15 id. 773; Johnson v. Cranage, 45 Mich. 14, 7 N. W. Rep. 188; Johnson v. Garlichs, 63 Mo. App. 578.

<sup>3</sup> Beardsley v. Beardsley, 29 C. C. A. 538, 86 Fed. Rep. 16. See Jennings v. Major, 8 C. & P. 61; Thayer v. Brackett, 12 Mass. 450.

A party qualifies his tender when he demands in return what, according to his own theory of his rights, he is strictly entitled to for the money he pays, and even though such theory is legally correct, if that theory is questioned. This is illustrated by Loring v. Cooke, 3 Pick. 48. A tender was made to redeem from an execution sale. The amount tendered was not the subject of dis-

pute; but the debtor demanded a release which was not necessary to cancel the sale, and the purchaser's inchoate title; and a release had been prepared by the tenderer ready for execution. The purchaser refused to execute it, and claimed to hold his purchase to secure other debts. This right was held not to exist, as the English doctrine of tacking was not recognized; but the tender was invalidated by the demand of a release, though if executed it would have extinguished no right which the purchaser could have asserted. In the subsequent case of Saunders v. Frost, 5 Pick. 259, 275, a tender was made on a mortgage debt after the mortgagee had taken possession to foreclose for interest in arrear, the principal not being due. The tender was of the whole mortgage debt, including interest computed to the date of the tender, and not to the maturity of the debt. The court held that as to the principal the tender was not good; for the creditor had a right to keep his debt at interest until the

amount of the debt a tender may always be restricted by such conditions as by the terms of the contract are precedent to or simultaneous with the payment of the debt or proper to be performed by the tenderee;<sup>1</sup> as that he shall discharge a mort-

time appointed for payment. But it was no objection to the tender in respect to interest due that a larger sum was tendered; nor that a discharge of the mortgage was demanded; for since the statute entitled the mortgagor to a discharge on payment of the mortgage debt the demand of such discharge was only of the performance of a duty imposed by law. So it seems that the tender, as to interest, was not rendered nugatory by being accompanied by a condition which was only admissible when a tender could rightfully be made of the mortgage debt. It was sustained because it was the duty of the mortgagee to inform the mortgagor that possession was held only for the interest due; and the mortgagee should have shown a willingness to accept payment of such interest.

In *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668, the court held that under a statute which requires a mortgagee of lands to discharge a mortgage of record, after having received full payment, a mortgagor is not entitled to demand such discharge when tendering such full payment; that the mortgagee could not be required to do so merely upon a tender of the amount as a condition to his right to receive the amount. Biddle, J., said: "When one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition, as where money is to be paid without condition. The current of authorities — indeed we believe it to be quite uniform — holds that the party bound to pay the money cannot

make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note the authorities are in conflict whether a good tender can be made upon the condition that the note shall be surrendered; but in the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered is good, because such paper might be put in circulation after payment, and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker it becomes harmless against him, wherever it may go."

A tender to be good must not be upon any condition prejudicial to the party to whom it was made. See *Wheelock v. Tanner*, 39 N. Y. 481; *Hepburn v. Auld*, 1 Cranch, 321. D. purchased some oats of F., who took goods worth \$41.78 in part payment. D. tendered \$170 to F., telling him that if he took \$130 of the amount it closed the whole business; and if he took the \$170 it settled the oat business and left the account for the goods standing; held not conditional; D. merely explained his tender. *Foster v. Drew*, 39 Vt. 51.

A tender of the amount due on a judgment, accompanied by a demand for the assignment of the security or writ, will not entitle the person making it to be subrogated to the plaintiff's rights therein. *Forest Oil Co.'s Appeals*, 118 Pa. 138, 12 Atl. Rep. 442.

<sup>1</sup> *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482; *Johnson v.*

gage;<sup>1</sup> return collateral security;<sup>2</sup> give a release;<sup>3</sup> or surrender mortgaged chattels, if a reasonable time be given.<sup>4</sup> If the holder of a note secured by mortgage claims them under an oral assignment from the payee and the latter has warned the maker not to pay the holder, the maker may require a written assignment or release from the payee as a condition of a tender.<sup>5</sup> A tender in payment of a mortgage is not conditional.<sup>6</sup> But if a tender is made upon condition its acceptance is an acceptance of the condition.<sup>7</sup> Thus a creditor who accepts money offered on condition that it be received in full satisfaction of a demand does so subject to the condition, notwithstanding he may then or subsequently protest.<sup>8</sup> In some of these cases

Cranage, 45 Mich. 14, 7 N. W. Rep. 188; Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. Rep. 204; Brink v. Freoff, 40 Mich. 614.

<sup>1</sup> Halpin v. Phenix Ins. Co., *supra*; Wheelock v. Tanner, 39 N. Y. 481; Salinas v. Ellis, 26 S. C. 337, 2 S. E. Rep. 121. See Jewett v. Earle, 53 N. Y. Super. Ct. 349; Werner v. Tuch, 52 Hun, 269, 5 N. Y. Supp. 219.

<sup>2</sup> Cass v. Higgenbotam, 100 N. Y. 253, 3 N. E. Rep. 189; Ocean Nat. Bank v. Fant, 50 N. Y. 474; Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. 435, 14 Pac. Rep. 369, 15 id. 773.

<sup>3</sup> Saunders v. Frost, 5 Pick. 259.

<sup>4</sup> Brink v. Freoff, 40 Mich. 610.

<sup>5</sup> Kennedy v. Moore, 91 Iowa, 39, 58 N. W. Rep. 1066.

<sup>6</sup> Davis v. Dow, 80 Minn. 223, 83 N. W. Rep. 50.

<sup>7</sup> St. Joseph School Board v. Hull, 72 Mo. App. 403; Rosema v. Porter, 112 Mich. 13, 70 N. W. Rep. 316; Potter v. Douglass, 44 Conn. 546; Walston v. Denny, 84 Ill. App. 417; Adams v. Helm, 55 Mo. 468; Kronenberger v. Binz, 56 id. 121; Lee v. Dodd, 20 Mo. App. 284; Kofoed v. Gordon, 122 Cal. 315, 54 Pac. Rep. 1115.

<sup>8</sup> Treat v. Price, 47 Neb. 875, 66 N. W. Rep. 834, citing Fuller v. Kemp, 138 N. Y. 231, 33 N. E. Rep. 1034, 20

L. R. A. 785; Reynolds v. Empire Lumber Co., 85 Hun, 470, 33 N. Y. Supp. 111; Donohue v. Woodbury, 6 Cush. 150, 52 Am. Dec. 777; McDaniels v. Lipham, 21 Vt. 222. To the same effect are Nassoioy v. Tomlinson, 148 N. Y. 326, 51 Am. St. 695, 42 N. E. Rep. 715; Bull v. Bull, 43 Conn. 455; Hilliard v. Noyes, 58 N. H. 312; Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. Rep. 304; Hinkle v. Minneapolis, etc. R. Co., 31 Minn. 434, 18 N. W. Rep. 275; Freiberg v. Moffett, 91 Hun, 17, 36 N. Y. Supp. 95; Anderson v. Standard Granite Co., 92 Me. 429, 43 Atl. Rep. 21, 69 Am. St. 522; Ennis v. Pullman Palace Car Co., 165 Ill. 161, 46 N. E. Rep. 439; Lang v. Lane, 83 Ill. App. 543; Pollman Coal & Sprinkling Co. v. St. Louis, 145 Mo. 651, 47 S. W. Rep. 563; Logan v. Davidson, 18 App. Div. 353, 45 N. Y. Supp. 961, affirmed without opinion 162 N. Y. 624; Connecticut River Lumber Co. v. Brown, 68 Vt. 239, 35 Atl. Rep. 56; Murphy v. Little, 69 Vt. 261, 37 Atl. Rep. 968; Ostrander v. Scott, 161 Ill. 339, 43 N. E. Rep. 1089; Vorhis v. Elias, 54 App. Div. 412, 56 N. Y. Supp. 134, 67 id. 1149; Lewinson v. Montauk Theatre Co., 60 App. Div. 572, 69 N. Y. Supp. 1050; Hamilton v. Stewart, 105 Ga. 300, 31 S. E. Rep. 184.

checks or drafts sent by mail to the creditor "in full satisfaction" or as "payment in full" were retained, and in some of them the claims were disputed. But ordinarily the retention of a check inclosed in a letter which refers to the amount as the balance due on accounts between the parties will not be an accord and satisfaction so as to bar an action for the balance due.<sup>1</sup> "It is only in cases where a dispute has arisen between the parties as to the amount due and a check is tendered on one side in full satisfaction of the matter in controversy that the other party will be deemed to have acquiesced in the amount offered by an acceptance and retention of the check."<sup>2</sup> If the amount of the claim is in dispute and the creditor advises his debtor that the amount for which his check was given has been credited to his account, and has not been accepted in full, the debtor will be deemed to have acquiesced in that application unless he expresses to the creditor his dissent.<sup>3</sup> To constitute the acceptance of less than is due an accord and satisfaction of a disputed and unliquidated claim the money must be tendered in satisfaction and the tender accompanied with such acts and declarations as make its acceptance a condition to that end.<sup>4</sup>

[464] When mutual acts are to be done by two parties at the same time and the right of each depends upon the performance of the other, either may tender his part of the performance upon the condition that the other discharges his duty; and neither is compelled to perform unless the other does so also; as when land is bargained and sold to be conveyed upon payment of the purchase-money. In such a case neither can be compelled to perform his part of the agreement except on the performance by the other of his part; that is, the vendee cannot demand the conveyance without tendering the purchase-money; and the vendor cannot demand the purchase-money

<sup>1</sup> *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. Rep. 986; *McKay v. Myers*, 168 Mass. 812, 47 N. E. Rep. 98; *Day v. Lea*, 22 Q. B. Div. 610.

<sup>2</sup> *Eames Vacuum Brake Co. v. Prosser*, *supra*; *Hodges v. Truax*, 19 Ind. App. 651, 49 N. E. Rep. 1079 (reviewing many cases).

<sup>3</sup> *Strock v. Brigantine Transportation Co.*, 23 N. Y. Misc. 358, 51 N. Y. Supp. 327; *McKeen v. Morse*, 1 C. C. A. 237, 49 Fed. Rep. 253.

<sup>4</sup> *Kingsville Preserving Co. v. Frank*, 81 Ill. App. 586; *Lang v. Lane*, 83 id. 543.



without tendering the conveyance; and either may make a good tender to the other upon the condition that he will perform his part of the agreement.<sup>1</sup> If the performance of precedent or contemporaneous conditions is refused the person whose duty it is to pay has done all that is required of him when he has made a tender; he is thereby excused from keeping it good.<sup>2</sup> But where it is provided by statute that a tender shall be unconditional except for a receipt in full or delivery of the obligation, one who has completed the payment of the purchase-money of land and is entitled to evidence of the title conditions a tender by making it dependent upon the execution of a conveyance.<sup>3</sup>

§ 271. **Effect of accepting.** Acceptance of a tender, when made as full payment, has the effect of entire satisfaction in case of a disputed claim.<sup>4</sup> But the acceptance of a proper tender, accompanied by no such condition, does not pre- [465] clude the creditor from proceeding for more.<sup>5</sup> An appeal is

<sup>1</sup> *Scott v. Beach*, 172 Ill. 273, 50 N. E. Rep. 196; *Comstock v. Lager*, 78 Mo. App. 390; *Clark v. Weis*, 87 Ill. 438, 29 Am. Rep. 60; *Englebach v. Simpson*, 33 S. W. Rep. 506, 12 Tex. Civ. App. 188; *Wheelock v. Tanner*, 39 N. Y. 486; *Mankel v. Belscamper*, 84 Wis. 218, 54 N. W. Rep. 500; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482; *Englander v. Rogers*, 41 Cal. 420; *Heine v. Treadwell*, 72 id. 217, 13 Pac. Rep. 503; *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

<sup>2</sup> *Cannon v. Handley*, 72 Cal. 133, 13 Pac. Rep. 315; *Washburn v. Dewey*, 17 Vt. 92; *White v. Dobson*, 17 Gratt. 262; *McDanel v. Kimbrell*, 3 G. Greene, 335.

<sup>3</sup> *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. Rep. 560; *Elder v. Johnson*, 115 Ga. 691, 42 S. E. Rep. 51.

<sup>4</sup> *St. Joseph School Board v. Hull*, 72 Mo. App. 403; *Towslee v. Healy*, 39 Vt. 522; *Springfield & N. R. Co. v. Allen*, 46 Ark. 217; *United States v. Adams*, 7 Wall. 463; *Jenks v. Burr*,

56 Ill. 450; *Draper v. Pierce*, 29 Vt. 250; *Cole v. Champlain Transportation Co.*, 26 Vt. 87; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Adams v. Helm*, 55 Mo. 468.

It is held in some cases that an unaccepted tender is an admission that there is a sum due the tenderee equal to it, and this although it be defective or be made in a case where it is not binding and cannot be pleaded. *Denver, etc. R. Co. v. Harp*, 6 Colo. 420; *Cilley v. Hawkins*, 48 Ill. 309. These cases are of doubtful authority, because the legal effect of such a tender is no more than a mere offer of compromise. No doubt is entertained that where a tender is made under a mistaken belief by the party who made it that the sum tendered was due evidence is admissible to rebut the inference that a debt was thereby admitted. *Ashuelot R. Co. v. Cheshire R. Co.*, 60 N. H. 356.

<sup>5</sup> *Higgins v. Halligan*, 46 Ill. 173; *Ryal v. Rich*, 10 East, 47; *Sleght v. Rhinelander*, 1 Johns. 192.

not waived by the receipt of a payment. The acceptance of a sum tendered on account of a claim only extinguishes it when it is all that the creditor is entitled to, or when it is received as being so.<sup>1</sup>

§ 272. **Must be kept good.** Unless the conduct of the party who is entitled to payment excuses the other from so doing<sup>2</sup> he must keep his tender good; that is, the debtor must at all times be prepared to meet a demand for money tendered; if he fails to do so he places himself in default and loses the benefit of his tender.<sup>3</sup> And the rule applies in chancery and at law.<sup>4</sup> It is not necessary to keep for the creditor the identical money tendered. The tenderer is at liberty to use it as his own; all he is under obligation to do is to be ready at all times to pay the debt in current money when requested.<sup>5</sup>

<sup>1</sup> Benkard v. Babcock, 2 Robert. 175.

<sup>2</sup> See § 268.

<sup>3</sup> Middle States Loan, Building & Construction Co. v. Hagerstown Mattress & Upholstery Co., 82 Md. 506, 33 Atl. Rep. 886; Parker v. Beasley, 116 N. C. 1, 21 S. E. Rep. 955, 33 L. R. A. 231; Shank v. Groff, 45 W. Va. 543, 33 S. E. Rep. 248; McDaniel v. Upton, 45 Ill. App. 151; Beardsley v. Beardsley, 29 C. C. A. 538, 86 Fed. Rep. 16; Crain v. McGoon, 86 Ill. 431; Sanders v. Peck, 131 id. 407, 35 N. E. Rep. 508; Aulger v. Clay, 109 Ill. 487; Wyckoff v. Anthony, 9 Daly, 417; Rainwater v. Hummell, 79 Iowa, 571, 44 N. W. Rep. 814; Wilson v. McVey, 83 Ind. 108; Park v. Wiley, 67 Ala. 310; Wilder v. Seelye, 8 Barb. 408; State v. Briggs, 65 N. C. 159; Bronson v. Rock Island, etc. R. Co., 40 How. Pr. 48; Mohn v. Stoner, 14 Iowa, 115, 11 id. 30; Warrington v. Pollard, 24 id. 281, 95 Am. Dec. 727; Kortright v. Cady, 23 Barb. 490, 5 Abb. Pr. 358; Brooklyn Bank v. DeGrauw, 23 Wend. 342, 35 Am. Dec. 569; Pulsifer v. Shepard, 36 Ill. 513; Nelson v. Oren, 41 Ill. 18; Cullen v. Green, 5 Harr. 17; Clark v. Mullenix, 11 Ind. 532; Jarboe v. McAtee, 7 B.

Mon. 279; Livingston v. Harrison, 2 E. D. Smith. 197; Call v. Scott, 4 Call, 403; Mason v. Croom, 24 Ga. 211; Brock v. Jones, 16 Tex. 461; Webster v. Pierce, 35 Ill. 158; Wood v. Merchants', etc. Co., 41 Ill. 267; Suver v. O'Riley, 80 Ill. 104; Haynes v. Thom, 28 N. H. 386; Nantz v. Lober, 1 Duv. 304; Hayward v. Hague, 4 Esp. 93; Pierse v. Bowles, 1 Stark. 323; Spybey v. Hide, 1 Camp. 181; Rivers v. Griffiths, 1 D. & Ry. 215; Coles v. Bell, 1 Camp. 478, note; Coore v. Callaway, 1 Esp. 115.

<sup>4</sup> De Wolf v. Long, 7 Ill. 679; Doyle v. Teas, 5 Ill. 202; Brooklyn Bank v. DeGrauw, 23 Wend. 342, 35 Am. Dec. 569; Stow v. Russell, 36 Ill. 18; McDaniel v. Upton, 45 Ill. App. 151, (holding that the rule applies to justices' courts).

A plaintiff failing in his suit in equity after tender and deposit of money in court brought error, and pending the proceedings in error withdrew the deposit; held, not a waiver of error. Vail v. McMillan, 17 Ohio St. 617.

<sup>5</sup> Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. Rep. 52; Thompson v. Lyon, 40 W. Va. 87, 20 S. E. Rep. 812; Cur-tiss v. Greenbanks, 24 Vt. 536. But

A refusal by the debtor, after a tender, to pay the money tendered on demand of the creditor deprives the offer [466] of all legal availability and effect.<sup>1</sup> For this purpose the debtor should keep the money in his own possession. A deposit of it with a third person for the creditor, with or without giving him notice thereof, will not exempt him from this necessity; for the creditor will be under no obligation to apply to the depositary for it. If he thinks proper to accept the tender, he may call on the debtor himself for it. In that case, unless the debtor pays or tenders the sum, he will lose the benefit of the previous tender.<sup>2</sup> Hence the debtor is entitled to the benefit of his tender if he is ready with the money on a demand made to himself personally, although he may have made the tender by his attorney.<sup>3</sup>

The demand for the money after a tender and refusal must be of the precise sum tendered,<sup>4</sup> and must be made by some one authorized to receive it and give the debtor a discharge.<sup>5</sup> Where the tender had been made by two persons, demand on one was sufficient.<sup>6</sup> If money is tendered with which the debtor has a right then to discharge the debt, and sufficient to satisfy it, he is not to bear the loss of its subsequent depreciation.<sup>7</sup>

see *Quynn v. Whetcroft*, 3 Harr. & McH. 352; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

<sup>1</sup> *Nantz v. Lober*, 1 Duval, 304; *Rose v. Brown*, Kirby, 293, 1 Am. Dec. 22.

<sup>2</sup> *Rainwater v. Hummell*, 79 Iowa, 571, 44 N. W. Rep. 814; *Town v. Trow*, 24 Pick. 168.

<sup>3</sup> *Berthold v. Reyburn*, 37 Mo. 586. A defendant's attorney having made a tender the plaintiff's attorney subsequently agreed to take it, but it was held this assent was not such a demand as would avoid the tender. The demand for such a purpose must be made upon the debtor personally.

<sup>4</sup> *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 1 Dow. & Ry. 215.

<sup>5</sup> *Coles v. Bell*, 1 Camp. 478, note; *Coore v. Calloway*, 1 Esp. 115.

<sup>6</sup> *Peirse v. Bowles*, 1 Stark. 523.

A letter, demanding payment of a debt, sent to the debtor's house, to which an answer is returned that the demand should be settled, was held to be sufficient evidence of a demand on an issue of a subsequent demand and refusal to a plea of tender. *Hayward v. Hague*, 4 Esp. 93.

A tender may lose its effect by mutual waiver, as where afterward the debtor, at the suggestion of the creditor, consents to retain the money. He cannot afterwards set it up as a defense. *Terrell v. Walker*, 65 N. C. 91.

<sup>7</sup> *Anonymous*, 1 Hayw. 183. See *Jeter v. Littlejohn*, 3 Murph. 186.

[467] § 273. **Waiver and omission of tender on sufficient excuse.** There is probably no difference in respect to the effect of stopping interest as damages, based on default, between an actual tender or tender with some punctilio waived and a readiness to pay, and a tender altogether prevented by the conduct of the creditor; as, for example, by his absence or concealment. For this effect it is only needful to negative default.<sup>1</sup> Where, however, the debt bears interest by agreement of the parties after it is payable, an actual tender is doubtless essential to stop interest unless the creditor prevents it by some fraudulent evasion.<sup>2</sup> Where a tender is made to the creditor, not in currency which he is bound to receive, but in bank bills current at par as money, and not objected to on that account; or is made by a check on a bank, assented to as a mode of payment, the offer is a sufficient tender. And where there is a verbal offer to pay and the debtor is prepared to make his offer good, but omits to produce the money to the view of the creditor because the latter says it need not be produced as he will not receive it, the proffer is in substance and legal effect a tender.<sup>3</sup> The law interprets the conduct of the parties in the ceremony of tender according to their apparent intentions, and determines its sufficiency upon the objections then stated. We have seen that certain incidents, such as demanding a receipt for what is paid, or change where there is an offer of a larger amount, or bank bills instead of money which is legal tender, must be specially objected to at the time. Silence is a tacit waiver of such objections. Other objections may also be waived by implication on the maxim of *expressio unius est exclusio alterius*. A general rule on this subject is that if a tender is refused on a specific ground the

<sup>1</sup> Thompson v. Lyon, 40 W. Va. 87, 20 S. E. Rep. 812; Thorne v. Mosher, 20 N. J. Eq. 257.

<sup>2</sup> Gilmore v. Holt, 4 Pick. 258; Southworth v. Smith, 7 Cush. 391; Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. Rep. 52.

<sup>3</sup> Stephenson v. Kilpatrick, 166 Mo. 262, 267, 65 S. W. Rep. 773; Holmes v. Holmes, 9 N. Y. 525; Hall v. Norwalk F. Ins. Co., 57 Conn. 105, 17

Atl. Rep. 356; Roe v. State, 82 Ala. 68, 3 So. Rep. 2; McDanel v. Kimbrell, 3 G. Greene, 335; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156, 58 Am. Rep. 806, 5 N. E. Rep. 417; Mathis v. Thomas, 101 Ind. 119; Hoffman v. Van Diemen, 62 Wis. 362, 21 N. W. Rep. 542; Sharp v. Todd, 38 N. J. Eq. 324; Duffy v. Patten, 74 Me. 396; Koon v. Snodgrass, 18 W. Va. 320. See § 268.

creditor will not be permitted afterwards to raise any other objection which, if stated at the time it was made, could have been obviated.<sup>1</sup>

**§ 274. Tender must be pleaded and money paid into court.**

If the money tendered is not demanded by the creditor, [468] and he brings suit, the defendant must plead the tender, and his plea must be accompanied by payment of the money into court for the creditor,<sup>2</sup> unless the effect of the tender is merely the extinguishment of a lien without discharging the debt, in which case payment into court is not necessary.<sup>3</sup> It is also unnecessary if it is merely desired to stop interest;<sup>4</sup> and so where there has been a breach of the vendor's contract to put the

<sup>1</sup> *Hull v. Peters*, 7 Barb. 331; *Carman v. Pultz*, 21 N. Y. 547; *Keller v. Fisher*, 7 Ind. 718; *Mitchell v. Cook*, 29 Barb. 243; *Haskell v. Brewer*, 11 Me. 258; *Hayward v. Munger*, 14 Iowa, 516; *Graves v. McFarlane*, 2 Cold. 167; *Bradshaw v. Davis*, 12 Tex. 336; *Nelson v. Robson*, 17 Minn. 284; *Rudolph v. Wagner*, 36 Ala. 698; *Stokes v. Recknagel*, 38 N. Y. Super. Ct. 368; *Ricker v. Blanchard*, 45 N. H. 39; *Abbot v. Banfield*, 43 id. 152; *Schroeder v. Pissis*, 128 Cal. 209, 60 Pac. Rep. 758; *Ricketts v. Buckstaff*, — Neb. —, 90 N. W. Rep. 915.

If a tender of money which the creditor refused is left with him against his wish, and he declines to give it up when called for, it will be sufficient. *Rogers v. Rutter*, 11 Gray, 410.

<sup>2</sup> *Colby v. Reed*, 99 U. S. 560; *Mathews v. Lindsay*, 20 Fla. 962; *Allen v. Cheever*, 61 N. H. 32; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482; *Coghlen v. South Carolina R. Co.*, 32 Fed. Rep. 316; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. Rep. 546, 15 id. 806; *Roberts v. White*, 146 Mass. 256, 15 N. E. Rep. 568; *Park v. Wiley*, 67 Ala. 310; *Frank v. Pickens*, 69 id. 369; *Goss v. Bowen*, 104 Ind. 207, 2 N. E. Rep. 704; *Fernald v. Young*, 76 Me. 356; *Jenkins*

*v. Briggs*, 65 N. C. 159; *Claffin v. Hawes*, 8 Mass. 261; *Harvey v. Hackley*, 6 Watts, 264; *Nelson v. Oren*, 41 Ill. 18; *Brown v. Ferguson*, 2 Denio, 196; *Sheriden v. Smith*, 2 Hill, 538; *Livingston v. Harrison*, 2 E. D. Smith, 197; *Robinson v. Gaines*, 3 Call, 243; *Hume v. Pepioe*, 8 East, 168; *Giles v. Hartis*, 1 Ld. Raym. 254; *Becker v. Boon*, 61 N. Y. 317; *Karthauss v. Owings*, 6 Har. & J. 134; *Griffin v. Tyson*, 17 Vt. 35; *Cullen v. Green*, 5 Harr. 17; *Mason v. Croom*, 24 Ga. 211; *Brock v. Jones*, 16 Tex. 461; *Clark v. Mullenix*, 11 Ind. 532; *Marine Bank v. Rushmore*, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Warrington v. Pollard*, 24 Iowa, 281, 95 Am. Dec. 727; *Jarboe v. McAtee*, 7 B. Mon. 279; *De Goer v. Kellar*, 2 La. Ann. 496; *Alexandrie v. Saloy*, 14 id. 327; *Call v. Scott*, 4 Call, 402; *State v. Briggs*, 65 N. C. 159; *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. Rep. 900. See *Terrell v. Walker*, 65 N. C. 91; and for a construction of the code of Oregon, see *Holladay v. Holladay*, 13 Ore. 523, 536, 11 Pac. Rep. 260, 12 id. 821.

<sup>3</sup> *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. Rep. 189. See § 277.

<sup>4</sup> *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. Rep. 308.

vendee of land into possession, the former having told the vendee that he would not comply with the contract.<sup>1</sup> And if the vendor puts himself in a position to make it appear that a tender of the purchase price would be refused if made, the vendee may plead an offer to bring the money into court, and may have specific performance.<sup>2</sup> If there is uncertainty as to the amount due the plaintiff may have specific performance by pleading readiness to bring the money into court whenever the sum is liquidated.<sup>3</sup> The payment made before trial is final; the debtor cannot speculate on the effect of the evidence and add to the sum paid after the trial has begun.<sup>4</sup> If the pleadings do not object to the failure to allege payment into court the money may be paid in during the trial, and, in the absence of an objection in the record, the appellate court will assume that it was so paid.<sup>5</sup>

**§ 275. Effect of plea of tender.** The plea of tender is a conclusive admission that the sum tendered is due;<sup>6</sup> and if the money is not paid into court the plaintiff may sign judgment.<sup>7</sup> But the tender and plea go no further than to admit the contract or duty sued upon, and the right of the plaintiff to the sum paid in. The defendant may contest the plaintiff's right to anything beyond that sum upon any ground consistent with an admission of the original contract or transaction.

<sup>1</sup> *Irwin v. Askew*, 74 Ga. 581.

<sup>2</sup> *Kerr v. Hammond*, 97 Ga. 567, 25 S. E. Rep. 337.

<sup>3</sup> *Id.*; *Irvin v. Gregory*, 13 Gray, 215.

<sup>4</sup> *Frank v. Pickens*, 69 Ala. 369.

A payment at the time of filing the answer will not affect the costs unless there is a specification of the amount paid on the claim and for costs. *The Good Hope*, 40 Fed. Rep. 608.

<sup>5</sup> *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482.

<sup>6</sup> *McDaniel v. Upton*, 45 Ill. App. 151; *Illinois Central Co. v. Cole*, 62 id. 480; *Noble v. Fagnant*, 162 Mass. 275, 286, 38 N. E. Rep. 507; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Taylor v. Brooklyn E. R. Co.*, 119 N.

Y. 561, 23 N. E. Rep. 1106; *Voss v. McGuire*, 26 Mo. App. 452; *Kansas City Transfer Co. v. Neiswanger*, 27 id. 356; *Schnur v. Hickox*, 45 Wis. 200; *Monroe v. Chaldeck*, 78 Ill. 429; *Roosevelt v. New York & H. R. Co.*, 30 How. Pr. 226; *Currier v. Jordan*, 117 Mass. 260; *Ruble v. Murray*, 4 Hayw. 27; *Huntington v. American Bank*, 6 Pick. 340; 2 Pars. on Cont. 638, note. But see *Clarke v. Lyon County*, 7 Nev. 75.

<sup>7</sup> *Chapman v. Hicks*, 2 Dowl. P. C. 641; *Monroe v. Chaldeck*, 78 Ill. 429. See *Knox v. Light*, 12 Ill. 86; *Sloan v. Petrie*, 16 Ill. 262; *Marine Bank v. Rushmore*, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Stow v. Russell*, 36 Ill. 35; *Reed v. Woodman*, 17 Me. 43.

He may insist upon the statute of limitations, payment beyond the sum tendered or other defense.<sup>1</sup> He cannot claim in a motion for arrest of judgment that the complaint is so defective as not to authorize the recovery of any sum.<sup>2</sup> It has been held that an answer under the code must allege that the money has been brought into court; and if it omits this allegation it does not state facts sufficient to constitute a defense and the plaintiff may avail himself of the objection on the trial;<sup>3</sup> it must also be alleged that the money is brought into court for the other party's use and benefit; it is not enough to say for his use.<sup>4</sup> And if issue be joined on the plea of tender, where the money has not been brought into court, [469] it has been held that judgment should be given for the plaintiff, notwithstanding a verdict in favor of the defendant on that issue.<sup>5</sup> But in other cases the omission to pay the money into court has been treated as an irregularity; and if the plaintiff accept the plea and reply thereto without receiving notice that the money has been paid in he waives the irregularity.<sup>6</sup> The

<sup>1</sup> *Cox v. Parry*, 1 T. R. 464; *Reid v. Dickons*, 5 B. & Ad. 499; *Meager v. Smith*, 4 id. 673; *Spalding v. Vandercook*, 2 Wend. 431; *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. Rep. 688; *Griffin v. Harriman*, 74 Iowa, 436, 38 N. W. Rep. 139; *Young v. Borzone*, 26 Wash. 4, 20, 65 Pac. Rep. 135.

<sup>2</sup> *Wilson v. Chicago, etc. R. Co.*, 68 Iowa, 673, 27 N. W. Rep. 916.

<sup>3</sup> *Becker v. Boon*, 61 N. Y. 417. See last section.

The notice of payment into court after suit which is required by the New York code is not waived by failing to return an answer pleading tender before suit or to otherwise raise the question before trial. *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. Rep. 688.

<sup>4</sup> *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. Rep. 771.

<sup>5</sup> *Claffin v. Hawes*, 8 Mass. 261.

<sup>6</sup> *Woodruff v. Trapnall*, 12 Ark. 640; *Sheriden v. Smith*, 2 Hill, 538; *Shepherd v. Wysong*, 3 W. Va. 46; *Roose-*

*v. New York & H. R. Co.*, 30 How. Pr. 226.

In the last case the defendant set up in the answer a tender without paying the money into court. This answer was accepted, and the plaintiff afterwards applied to the court for an order requiring the defendant to pay to the plaintiff the sum tendered, under a provision of the code that "when the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." The tender was held to be such an admission. The court say: "The money tendered in this case was not paid into court, and it is to be inferred from the fact that the answer is treated as part of the pleadings that it is accepted without the money being paid in. On the facts

technical rules governing pleas of tender in actions at law do not apply in equity. Upon a bill to enforce specific performance of an agreement to accept a named sum of money in satisfaction of a debt secured by pledged property a tender is well pleaded by alleging readiness, willingness and ability to pay the amount due or to bring it into court to be paid upon transfer of the collateral.<sup>1</sup>

The plaintiff is entitled to the money paid into a court of law, with a plea of tender, in any event.<sup>2</sup> He may take it out, though he replies that the tender was not made before action brought.<sup>3</sup> The fact that more is paid than is due, or that no payment was necessary for the protection of the rights of the party who paid, does not give him the right to withdraw the money or any part of it.<sup>4</sup> But the rule that the plaintiff is entitled absolutely to the amount tendered and paid into court has been held not to apply to an action brought to recover a penalty or other fixed amount, where, unless the plaintiff recovers the amount of the penalty or fixed sum, he is not entitled to judgment.<sup>5</sup> Nor is it applicable to money paid into court by the plaintiff on a bill in equity to redeem, where the defendant for whom such money is paid successfully contests the right to redeem.<sup>6</sup> In such an action the plaintiff paid in,

before me I must treat the plea of tender as sufficient, although the money has not been paid into court. But if the tender was irregular for the reason stated, the admission of the justice of the plaintiff's claim would be none the less distinct and unequivocal." See also *Merritt v. Thompson*, 10 How. Pr. 428; *Thurston v. Marsh*, 5 Abb. Pr. 389.

<sup>1</sup> *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. Rep. 347, 50 L. R. A. 401; *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. E. Rep. 1067.

<sup>2</sup> *Foster v. Napier*, 74 Ala. 393; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561, 23 N. E. Rep. 1106; *Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356; *Dillenback v. The Ross-end Castle*, 30 Fed. Rep. 462; *Supply Ditch Co. v. Elliott*, 10 Colo. 327,

15 Pac. Rep. 691; *Sweetland v. Tut-hill*, 54 Ill. 215; *Munk v. Kanzler*, 26 Ind. App. 105 58 N. E. Rep. 543; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. Rep. 151; *Beil v. Supreme Council American Legion of Honor*, 42 App. Div. 168, 58 N. Y. Supp. 1049. See *Ruble v. Murray*, 4 Hayw. 27.

If money paid into court in a suit for unliquidated damages is taken out in good faith by the plaintiff's solicitor and paid to his client the solicitor cannot be compelled to repay it after his client's death. *Davys v. Richardson*, 21 Q. B. Div. 202.

<sup>3</sup> *Le Grew v. Cooke*, 1 Bos. & Pul. 332.

<sup>4</sup> *Fox v. Williams*, 92 Wis. 320, 66 N. W. Rep. 357.

<sup>5</sup> *Canastota & M. Plank R. Co. v. Parkill*, 50 Barb. 601.

<sup>6</sup> *Putnam v. Putnam*, 13 Pick. 129.



under order of the court, a sum previously tendered; in the meantime he had failed to keep his tender good, and judgment was given for the defendant for that reason. The plaintiff was then entitled to withdraw the money except so much as might pay the defendant's costs.<sup>1</sup> By withdrawing money paid into court the plaintiff accepts it for the purposes for which it was paid; he cannot claim that it was merely payment on account.<sup>2</sup>

In this case Shaw, C. J., said: "There is no analogy between the payment of money into court in a common-law action of debt or *assumpsit* and a like payment upon a bill in equity to redeem under our statute, and hence the authorities applicable to the former case afford no rule governing the present. By payment into court, in an action claiming debt or damages, the defendant admits, in the most formal manner, his absolute liability to that sum, and by the form of the rule or plea offers it in satisfaction and discharge of such admitted liability. If not accepted it is paid into court for the plaintiff's use, and the defendant derives the full benefit of it as if paid to and accepted by the plaintiff himself, because it operates as a bar *pro tanto* to all claims in respect to such sum. It is therefore upon the strongest reason held that such payment shall be deemed absolute, and the party shall not be permitted to draw it in question on the ground of equity or mistake, or any ground except fraud or imposition.

"But the character of a payment of money into court on a bill in equity to redeem a mortgage is entirely different. It is in its nature entirely provisional; it is an offer to pay in discharge of a debt secured by mortgage on real estate, the purpose of which is to release such real estate from the incumbrance. But the defendant contests the right to

redeem; alleges that, by force of law and the lapse of time, the mortgage is foreclosed, that she has become the absolute owner of the estate, and of course that there is no longer any debt secured by mortgage, and, consequently, that she has no claim to the money offered in satisfaction of such debt. This defense prevails, and the conclusion of law is that the defendant was right in rejecting the money tendered and not releasing the estate. She cannot now be allowed to claim this money against her own formal act showing that she has no title to it. Nor ought the plaintiffs to be bound by a provisional offer of money to redeem an estate, where it appears that they cannot redeem, and the payment cannot avail them for the only purpose for which the money was offered."

<sup>1</sup> Dunn v. Hunt, 76 Minn. 196, 78 N. W. Rep. 1100.

<sup>2</sup> Haeussler v. Duross, 14 Mo. App. 103; Turner v. Lee Gin & Machine Co., 98 Tenn. 604, 41 S. W. Rep. 57; Gardner v. Black, 98 Ala. 638, 12 So. Rep. 813; Hanson v. Todd, 95 Ala. 328, 10 So. Rep. 354; Cline v. Rude-sill, 126 N. C. 523, 36 S. E. Rep. 36. Compare Spaulding v. Vandercook, 2 Wend. 431; Sleght v. Rhinelander, 1 Johns. 192; Johnston v. Columbian Ins. Co., 7 Johns. 315. The opinion in the Tennessee case cited contains a summary of the practice under the old procedure.

**[470] § 276. Effect of tender when money paid into court.**

A mere tender of a sufficient sum only has the effect to stop interest and protect the debtor against subsequent costs. It does not discharge the debt.<sup>1</sup> But when the debtor has kept the tender good, and, on being sued, regularly pleads it and brings the money into court, it accomplishes such discharge [471] whether the action proceeds to judgment or not. If the action abate or be withdrawn, the defendant in a subsequent action may plead the tender and payment into court in the first action; and if these facts are established he will be entitled to judgment.<sup>2</sup>

**§ 277. Effect of tender on collateral securities.** A sufficient tender, however, will discharge all liens and collateral securities; and for this effect it need not be kept good, nor be brought into court.<sup>3</sup> Thus, where a mortgage of real estate is a mere security for the debt and the legal title remains in the mortgagor precisely the same after as before the debt is due,

<sup>1</sup> *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. Rep. 308; *Ruppel v. Missouri Guarantee Savings & Building Ass'n*, 158 Mo. 613, 59 S. W. Rep. 1000; *Wright v. Robinson*, 84 Hun. 172, 32 N. Y. Supp. 463; *Law v. Jackson*, 9 Cow. 641; *Carley v. Vance*, 17 Mass. 389; *Haynes v. Thom*, 28 N. H. 386, 400; *Barnard v. Cushman*, 35 Ill. 451; *Raymond v. Bearnard*, 12 Johns. 274, 7 Am. Dec. 317; *Coit v. Houston*, 3 Johns. Cas. 243; *Jackson v. Law*, 5 Cow. 248; *Cornell v. Green*, 10 S. & R. 14. See *Jeter v. Littlejohn*, 3 Murph. 186; *Staat v. Evans*, 35 Ill. 455; *Teass' Adm'r v. Boyd*, 29 Mo. 131; *Wheeler v. Woodward*, 66 Pa. 158; *Pennsylvania Co. v. Dovey*, 64 id. 260; *Dixon v. Clark*, 5 C. B. 365; *Waistell v. Atkinson*, 3 Bing. 289; *Johnson v. Triggs*, 4 G. Greene, 97; *Freeman v. Fleming*, 5 Iowa, 460; *Shant v. Southern*, 10 id. 415; *Mohn v. Stoner*, 11 id. 30; *Hayward v. Munger*, 14 id. 516.

<sup>2</sup> *Robinson v. Gaines*, 3 Call, 243. See *Warder v. Arell*, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

*Keys v. Roder*, 1 Head, 19, was an action of debt commenced in a justice's court. It was held that a mere offer by the defendant to the plaintiff of the sum claimed before the issuance of the warrant could not be pleaded as a valid tender in bar of the action. The money should have been produced and offered also at the time of the trial before the justice; and upon appeal to the circuit court, it should have been brought into that court at the time of filing the papers, and still held ready and produced as a continuous offer. A mere offer of the amount to the plaintiff by the defendant's counsel, in the progress of the argument in the circuit court, was not sufficient.

<sup>3</sup> *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322, 39 N. E. Rep. 1110; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Wright v. Robinson*, 84 Hun. 172, 32 N. Y. Supp. 463; *Willard v. Harvey*, 5 N. H. 252; *Swett v. Horn*, 1 id. 332; *Maynard v. Hunt*, 5 Pick. 240.

and until there is a foreclosure, the tender of the amount due after the law day and before foreclosure will discharge the mortgage; and if the mortgagee is in possession the mortgagor may recover in ejectment.<sup>1</sup> But to establish a tender and refusal, such as will discharge the lien of a mortgage without the tender being kept good, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage, and that sufficient opportunity was afforded to ascertain the amount due; at least it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due.<sup>2</sup> Though the tender be sufficient, yet if the mortgagor asks for affirmative relief, even for extinguishment of the lien, he must do equity; this obliges him to keep the tender good; he must pay the amount equitably due the mortgagee.<sup>3</sup> Where the incidents attached to a mortgage of real estate are those which prevailed at the common law, the mortgagee having an estate on condition which becomes absolute by reason of non-payment on the day named, a tender will not discharge the lien unless it is made punctually and is kept good.<sup>4</sup> A tender will discharge a

<sup>1</sup> Kortright v. Cady, 21 N. Y. 343, 5 Abb. Pr. 358; Jackson v. Crafts, 18 Johns. 110; Edwards v. Farmers' F. Ins. & L. Co., 21 Wend. 467; Farmers' F. Ins. & L. Co. v. Edwards, 26 id. 541; Arnot v. Post, 6 Hill, 65; Post v. Arnot, 2 Denio, 344; Tiffany v. St. John, 5 Lans. 153, 65 N. Y. 314; Hartley v. Tatham, 1 Robert. 246, 1 Keyes, 232; Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623; McDaniels v. Reed, 17 Vt. 674; Eslow v. Mitchell, 26 Mich. 500; Caruthers v. Humphrey, 12 id. 270; Van Huse v. Kanouse, 13 id. 303; Saltus v. Everett, 20 Wend. 267; Salinas v. Ellis, 26 S. C. 337, 2 S. E. Rep. 121; Thornton v. National Exchange Bank, 71 Mo. 221. See Harris v. Jex, 66 Barb. 232; Merritt v. Lambert, 7 Paige, 344; Ketchum v. Crippen, 37 Cal. 223; Bryan v. Maume, 28 Cal. 238; Wilson v. Keeling, 1 Wash. (Va.) 194; Werner v. Tuch, 52 Hun, 269, 5 N. Y. Supp. 219.

<sup>2</sup> Tuthill v. Morris, 81 N. Y. 94; Parks v. Allen, 42 Mich. 82, 4 N. W. Rep. 227; Jewett v. Earle, 53 N. Y. Super. Ct. 349; Waldron v. Murphy, 40 Mich. 668.

<sup>3</sup> Tuthill v. Morris, 81 N. Y. 94; Landis v. Saxton, 89 Mo. 375, 1 S. W. Rep. 359. See Salinas v. Ellis, 26 S. C. 337, 2 S. E. Rep. 121.

<sup>4</sup> Crain v. McGoan, 86 Ill. 431; Matthews v. Lindsay, 20 Fla. 962; Schearff v. Dodge, 33 Ark. 340; Alexander v. Caldwell, 61 Ala. 543; Greer v. Turner, 36 Ark. 17; Currier v. Gale, 9 Allen, 522; Holman v. Bayley, 3 Met. 55; Phelps v. Sage, 2 Day, 151; Shields v. Lozeau, 34 N. J. L. 496, 3 Am. Rep. 256; Rowell v. Mitchell, 68 Me. 21; Storey v. Krewson, 55 Ind. 397, 23 Am. Rep. 668; Collins v. Robinson, 33 Ala. 91; Slaughter v. Swift, 67 id. 494; Frank v. Pickens, 69 id. 369; Tompkins v. Batie, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. Rep. 747; Hudson v.

mechanic's lien for the repair of personal property;<sup>1</sup> an attorney's lien;<sup>2</sup> a pledge or mortgage of personal property;<sup>3</sup> the [472] right to distrain for rent;<sup>4</sup> and will release a surety.<sup>5</sup> But a tender of the sum due on a contract for the purchase of land, the legal title being in the vendor, does not discharge his lien; he can be divested of his title only by payment of the purchase-money.<sup>6</sup> A landlord's statutory lien for rent is not discharged by a tender of the rent due.<sup>7</sup>

Whether a judgment which is a lien on land, or under which an execution has been levied, will be discharged by a tender is not very clearly settled. It has been held that to make a tender effectual for this purpose the money should be brought into court and the judgment satisfied of record. Being a debt of record, and a tender not discharging it, the lien, being a legal consequence, must subsist while the debt continues in that form.<sup>8</sup> But the weight of reason, if not authority, is in

Glencoe Sand & Gravel Co., 140 Mo. 103, 41 S. W. Rep. 450, 62 Am. St. 722; Himmelmänn v. Fitzpatrick, 50 Cal. 650; Mitchell v. Roberts, 17 Fed. Rep. 776.

<sup>1</sup> Moynahan v. Moore, 9 Mich. 9; Ball v. Stanley, 5 Yerg. 199, 26 Am. Dec. 263.

<sup>2</sup> Stokes on Lien of Att'ys, 81, 172; Jones v. Tarleton, 9 M. & W. 675; Scarfe v. Morgan, 4 id. 280; Irving v. Viana, 2 Y. & Jer. 71.

<sup>3</sup> Hyams v. Bamberger, 10 Utah, 3, 36 Pac. Rep. 202, citing the text; Norton v. Baxter, 41 Minn. 146, 42 N. W. Rep. 865, 4 L. R. A. 305; Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. 435, 14 Pac. Rep. 369, 15 id. 773; McCalla v. Clark, 55 Ga. 53; Wildman v. Radenaker, 20 Cal. 615; Ball v. Stanley, *supra*; Cooley v. Weeks, 10 Yerg. 141; Coggs v. Bernard, 2 Ld. Raym. 909; Comyn's Dig., tit. Mortgage, A. But not after the day it is due. Tompkins v. Batie, *supra*. *Contra*, Hyams v. Bamberger, 10 Utah, 3, 36 Pac. Rep. 202. See Frank v. Pickens, 69 Ala. 369.

<sup>4</sup> Hunter v. Le Conte, 6 Cow. 728; Davis v. Henry, 63 Miss. 110.

<sup>5</sup> Smith v. Old Dominion Building & Loan Ass'n, 119 N. C. 257, 26 S. E. Rep. 40; Mitchell v. Roberts, 17 Fed. Rep. 776; Brandt on Suretyship, §§ 21, 22; Appleton v. Donaldson, 3 Pa. 381; Spurgeon v. Smitha, 114 Ind. 453, 17 N. E. Rep. 105; Joslyn v. Eastman, 46 Vt. 258; White v. Life Ass'n of America, 63 Ala. 419, 35 Am. Rep. 45; McQuesten v. Noyes, 6 N. H. 19; Saily v. Elmore, 2 Paige, 497; Fisher v. Stockebrand, 26 Kan. 565; Hayes v. Josephi, 26 Cal. 535; Solomon v. Reese, 34 id. 28. Compare Clark v. Sickler, 64 N. Y. 231, 21 Am. Rep. 606; Second Nat. Bank v. Poucher, 56 N. Y. 348.

<sup>6</sup> Schearff v. Dodge, 33 Ark. 346.

<sup>7</sup> Hamlett v. Tallman, 30 Ark. 505; Bloom v. McGehee, 38 Ark. 329.

<sup>8</sup> Jackson v. Law, 5 Cow. 248; Law v. Jackson, 9 id. 641; Halsey v. Flint, 15 Abb. Pr. 367. See Shumaker v. Nichols, 6 Gratt. 592; Flower v. Elwood, 66 Ill. 447, 449; Redington v. Chase, 34 Cal. 666. But see also Mason v. Sudam, 2 Johns. Ch. 172; Tiffany v. St. John, 5 Lans. 153, 65 N. Y. 314, 23 Am. Rep. 55.

favor of holding an execution lien discharged by a tender the same as a conventional lien would be. In each case the lien exists as a collateral advantage to the creditor. It is incidental to the debt. In each case, if the lien is not satisfied, there is a power to sell. Payment will extinguish one as well as the other.<sup>1</sup> But it will not discharge a lien to secure the payment

<sup>1</sup> *Tiffany v. St. John*, 65 N. Y. 314, 23 Am. Rep. 55. In this case Dwight, C., said: "There is, undoubtedly, a stage in a proceeding in an action where property is in the custody of the law, that a tender will not destroy the lien, as that might interfere with the proper disposition of the case. After the action is over, and judgment obtained, and execution levied, the case becomes clearly assimilated to that of an ordinary lien: and if tender is made and not accepted the lien will be extinguished. This distinction was settled as far back as the time of Lord Coke, and is clearly stated in the *Six Carpenters' Case* (8 Coke, 146a). The point there discussed was the effect of a tender in the case of a distress for rent, or of cattle doing damage — an instance of a lien created by the act of the law. Coke considers the distinction between a tender made upon the land before distress, after the distress and before impounding, after impounding and before the determination of the litigation, and contrasts these with a tender made after the law has determined the rights of the parties. He says: 'Note, reader, this difference: that tender upon the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer, and not the taking, wrongful; tender after the impounding makes neither one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But

after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of detinue for the detainer after, or he may, upon satisfaction made in court, have a writ for the redelivery of his goods.' He adds: 'And there-with agree all the books, and *Pelkington's Case*, in the fifth part of my reports (fol. 76), and so all the books which, *prima facie*, seem to disagree, are, upon full and pregnant reason, well reconciled and agreed.'

"There is here a clear statement of the principle applicable to the case at bar. Here the law has already determined the right which has become final in analogy to the 'return irreplevisable' of Lord Coke, and the tender having been made and refused, if it were sufficient in amount, an action of replevin in the *detinet* will lie in analogy to the action of *detinue* referred to by him. It should also be observed that Lord Coke's rule provides that the owner of goods has his election to make an application to the court for relief.

"The defendant cites in opposition to these views the case of *Jackson v. Law*, 5 Cow. 248, 9 id. 641. That case, however, has no bearing upon the present controversy. The point there decided was that a tender of money due upon a judgment by a junior judgment creditor did not discharge it, nor take away the lien of the senior judgment creditor upon lands, but that the latter might still redeem upon his judgment within the terms of the statute ap-

of special assessments for street improvements, no personal liability therefor existing.<sup>1</sup>

[473] A plea of tender should conclude by praying judgment whether the plaintiff ought to recover any damages by reason of the non-payment of the sum alleged to have been tendered.<sup>2</sup> If upon the trial the sum tendered and brought into court is found by the jury to be less than was due at the time of the tender the verdict and judgment should be for the whole amount of the plaintiff's demand, without any deduction on account of the money brought into court. The defendant, however, is entitled to the benefit of the payment by indorsement upon the judgment or execution.<sup>3</sup>

[474] § 278. **Paying money into court.** A practice was introduced into England in the time of Charles II. of paying money into court where no previous tender had been made.<sup>4</sup> This is supposed to have been adopted to avoid the hazard and difficulty of pleading a tender.<sup>5</sup> The money was paid in on a rule of court, and thereafter the plaintiff proceeded for more at the hazard of paying subsequent costs. The amount paid in was stricken from the declaration, and no evidence given of that part of the claim.<sup>6</sup> It was at first required to be paid in before plea, but was afterwards allowed by

pliable to that subject. The ground of this decision briefly was that a judgment, being a debt of record, is not discharged by a tender, and it is, in no case, the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remained in force, it must, by its very nature, as prescribed by statute, be a lien on the land. If its existence continued it could not be deprived of its ordinary and usual characteristics. The case is very different with a pledge or mortgage, or lien of any kind collateral to the debt. To this class of collateral liens an execution belongs, and on general principles a tender destroys it. Even in the case of a judgment a tender may have such an effect as to make it inequitable to enforce the lien; and a

court of equity may set aside a sale under it as irregular and void. *Mason v. Sudam*, 2 Johns. Ch. 172." See *Crozer v. Pilling*, 6 D. & R. 129.

<sup>1</sup> *McGuire v. Brockman*, 58 Mo. App. 307.

<sup>2</sup> *Karthaus v. Owings*, 6 Har. & J. 134.

<sup>3</sup> *Dakin v. Dunning*, 7 Hill, 30, 42 Am. Dec. 33; *Huntington v. Zeigler*, 2 Ohio St. 10; *Bennett v. Odom*, 30 Ga. 940; *Baker v. Gasque*, 3 Strobb. 25; *Reed v. Woodman*, 17 Me. 43; 1 Tidd's Pr. 569.

<sup>4</sup> Payment into court without a rule may be disregarded. *Levan v. Sternfeld*, *infra*.

<sup>5</sup> *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. Rep. 854; Arch. Pr. 199; *Boyden v. Moore*, 5 Mass. 365; *Reed v. Woodman*, 17 Me. 43.

<sup>6</sup> *Id.*

withdrawing the plea. The rule allowing the defendant to pay money into court was granted generally on condition of paying costs, directing that sum to be stricken out of the declaration, if refused by the plaintiff, and concerning it no evidence to be received on the trial. This reduced the controversy to the *quantum* of damages; and the consequence was that, if the plaintiff did not prove a greater sum due than that paid in, a verdict passed for the defendant and he had judgment for subsequent costs. If the plaintiff proved that more was due, he had a verdict and judgment for the balance and subsequent costs.<sup>1</sup> The payment of money into court was proved by production of the rule.<sup>2</sup> But when the tender is found sufficient and the money has been brought into court the verdict should be for the defendant.<sup>3</sup>

## SECTION 6.

## STIPULATED DAMAGES.

§ 279. **Contracts to liquidate damages valid.** After [475] damages have been sustained an agreement to pay such sum therefor as shall be ascertained in a particular way is binding.<sup>4</sup> And parties in making contracts are at liberty to stipulate the amount which shall be paid by either to the other as compensation for the anticipated actual loss or injury which they foresee or concede will result from a breach if it should occur.<sup>5</sup> Without express statutory authority officers who are authorized by law to make contracts for a state or municipality have

<sup>1</sup> 1 Bac. Abr. 473c. See *Ruble v. Murray*, 4 Hayw. 27.

<sup>2</sup> *Id.*

<sup>3</sup> *Pennypacker v. Umberger*, 22 Pa. 492; *Levan v. Sternfeld*, *supra*.

In *Hill v. Smith*, 34 Vt. 535, the defendant, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration and costs to the time of such payment, and the plaintiff took the money; it was held that in the ab-

sence of proof that the plaintiff took it in satisfaction of his claim, he was not thereby precluded from filing new counts and recovering an additional sum thereon.

<sup>4</sup> *Longridge v. Dorville*, 5 B. & Ald. 117. See *Hosmer v. True*, 19 Barb. 106.

<sup>5</sup> *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240; *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. Rep. 892; *Holmes v. Holmes*, 12 Barb. 137; *Fasler v. Beard*, 39 Minn. 32, 38 N. W. Rep. 755.

power to fix a sum as liquidated damages for their violation. The sum designated in the contract or subsequently agreed upon becomes, on the happening of the event on which its payment depends, the precise sum to be recovered, and the jury are confined to it.<sup>2</sup> Nor will equity relieve from the payment of it.<sup>3</sup> As will more fully appear hereafter, there are limitations on the power thus to contract. As a general rule, where the injury resulting from the breach of a contract is susceptible of definite measurement, as where the breach consists in the non-payment of money, the parties will not be sustained in the enforcement of stipulations for a further sum, whether in the form of a penalty or liquidated damages; but where the damages sustained are uncertain and are not readily susceptible of being reduced to a certainty by a legal computation they may be determined before a breach occurs.<sup>4</sup> The

<sup>1</sup> State Trust Co. v. Duluth, 70 Minn. 257, 73 N. W. Rep. 249; Brooks v. Wichita, 114 Fed. Rep. 297, 52 C. C. A. 209; Little v. Banks, 86 N. Y. 258; Parr v. Greenbush, 42 Hun, 232; Nelson v. Jonesboro, 57 Ark. 168, 20 S. W. Rep. 1093; Salem v. Anson, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169.

<sup>2</sup> Smith v. Newell, 37 Fla. 147, 20 So. Rep. 249; American Copper, Brass & I. Works v. Galland-Burke Brewing & M. Co., — Wash. —, 70 Pac. Rep. 236; Kelso v. Reid, 145 Pa. 606, 27 Am. St. 716, 23 Atl. Rep. 323; Welch v. McDonald, 85 Va. 500, 8 S. E. Rep. 711; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. Rep. 213; Lowe v. Peers, 4 Burr. 2225; Beale v. Hayes, 5 Sandf. 640; Tardeveau v. Smith's Ex'r, Hardin, 175, 13 Am. Dec. 727. See Bradshaw v. Craycraft, 3 J. J. Marsh. 79; Keeble v. Keeble, 85 Ala. 552, 5 So. Rep. 149.

In Louisiana the sum agreed to be paid by way of liquidated damages is subject to reduction under certain circumstances; when the reduction is permissible, and suit is brought for the whole amount, the *onus* is upon

the party claiming the reduction to establish the extent to which it should be made. Goldman v. Goldman, 51 La. Ann. 761, 25 So. Rep. 555.

Under the Ontario judicature act of 1895 equity will award actual damages, estimated on a liberal scale, in lieu of the damages stipulated for. Townsend v. Toronto, etc. R. Co., 28 Ont. 195.

<sup>3</sup> Harper v. Tidholm, 155 Ill. 370, 40 N. E. Rep. 575; Ewing v. Litchfield, 91 Va. 575, 22 S. E. Rep. 362; Sanford v. First Nat. Bank, 94 Iowa, 680, 63 N. W. Rep. 459; Wood v. Niagara Falls Paper Co., 121 Fed. Rep. 818 (Ct. Ct. of Appeals, 2d Ct.); Wibaux v. Grinnell Live Stock Co., 9 Mont. 154, 162, 22 Pac. Rep. 492; 2 Story's Eq. § 1318; 3 Lead. Cas. in Eq. 671 *et seq.*; Westerman v. Means, 12 Pa. 97; Downey v. Beach, 78 Ill. 53; Brooks v. Wichita, 114 Fed. Rep. 297, 52 C. C. A. 209; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 661, 22 Sup. Ct. Rep. 240; Young v. Gaut, 69 Ark. 114, 61 S. W. Rep. 372.

<sup>4</sup> Goldman v. Goldman, 51 La. Ann. 761, 25 So. Rep. 555; Kunkel v. Wherry, 189 Pa. 198, 42 Atl. Rep. 112,



validity of an agreement to stipulate what the damages shall be is to be determined by the situation of the parties and their apprehension of the effect of a breach of the contract at the time of making it. The fact that it is subsequently ascertained that the damages caused by the breach were capable of ascertainment does not change the legal effect of their stipulation.<sup>1</sup> There is an implied condition in every judicial sale that if the purchaser does not pay the price he offered he will pay the difference between that price and the price realized on a subsequent sale duly made after proper notice, and also pay the expense of such sale. This condition has the same effect as if there was a formal contract stipulating the damages for such default.<sup>2</sup>

**§ 280. Damages can be liquidated only on a valid contract.**

A valid contract must exist on which damages could be recovered.<sup>3</sup> If void for not being in writing,<sup>4</sup> or if impeached for fraud,<sup>5</sup> the stipulation for damages will share the fate of the contract. And it has been held that an agreement to pay a sum as liquidated damages in case a court in which an action was pending should fail to make an order containing a specified provision is void, for being against public policy, or in the nature of a wager.<sup>6</sup> A contract is not void so as to bar the re-

69 Am. St. 802; *Tobler v. Austin*, 22 Tex. Civ. App. 99, 53 S. W. Rep. 706; *Palmer v. Toms*, 96 Wis. 367, 71 N. W. Rep. 654; *Fasler v. Beard*, 39 Minn. 32, 38 N. W. Rep. 755; *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 20 Sup. Ct. Rep. 240; *Brooks v. Wichita*, 114 Fed. Rep. 297, 52 C. C. A. 209; *Whitfield v. Levy*, 35 N. J. L. 149.

<sup>1</sup> *Wilson v. Jonesboro*, 57 Ark. 168, 20 S. W. Rep. 1093; *Dunn v. Morgenthau*, 73 App. Div. 147, 76 N. Y. Supp. 827.

<sup>2</sup> *Howison v. Oakley*, 118 Ala. 215, 238, 23 So. Rep. 810.

<sup>3</sup> The ordinary terms of an application for life insurance, stipulating that insurer should not be liable until it received the first premium, does not constitute the amount of such premium liquidated damages for its

non-payment. *Royal Victoria L. Ins. Co. v. Richards*, 31 Ont. 483.

<sup>4</sup> *Newman v. Perrill*, 73 Ind. 153; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311.

<sup>5</sup> *Darrow v. Cornell*, 12 App. Div. 604, 42 N. Y. Supp. 1081; *Wambaugh v. Bimer*, 25 Ind. 368. See *Fruin v. Crystal R. Co.*, 89 Mo. 397, 14 S. W. Rep. 557.

<sup>6</sup> *Dittrich v. Gobey*, 119 Cal. 599, 51 Pac. Rep. 962; *Cowdrey v. Carpenter*, 1 Robert. 429. A party to an action for the foreclosure of a mortgage of real estate on assigning a junior mortgage of only a part of the premises stipulated with its assignee that the order of sale should direct the property not covered by the junior mortgage to be first sold for the payment of the mortgage being foreclosed. It was held that, the stipu-

covery of the sum stipulated as damages for the violation of its condition as to the sale of a good-will because it includes more territory than the statute allows. Though the contract is void as to the excess of such territory the defendant, by breaching it within the territory as to which it was valid, became liable for the entire sum stipulated to be paid in that event.<sup>1</sup> A provision in a contract for liquidating the damages which may result from its breach will not be extended by construction to other provisions or conditions in it than are within its obvious scope and purpose.<sup>2</sup>

### § 281. Modes of liquidating damages; computation of time.

[476] The stipulation for the adjustment of the amount of damages is usually embraced in the contract for the violation of which they are to be paid; but not always so. A deposit may be made with a third person or with the party, of money, a note, or something else of value to be paid, delivered over or retained on the happening of the breach.<sup>3</sup> Agreements are of

lation being void, the assignee could not recover the liquidated damages specified in it upon its breach by the making of an order without the designated provision. See *Voorhees v. Reed*, 17 Ill. App. 21.

<sup>1</sup> *Franz v. Bieler*, 126 Cal. 176, 56 Pac. Rep. 249, 58 id. 466; *Price v. Green*, 16 M. & W. 346.

<sup>2</sup> *Curnan v. Delaware & O. R. Co.*, 138 N. Y. 480, 34 N. E. Rep. 201.

<sup>3</sup> *Moore v. Durnam*, — N. J. Eq. —, 51 Atl. Rep. 449; *Wallis v. Smith*, 21 Ch. Div. 243; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Magee v. Lavell*, 9 id. 107; *Swift v. Powell*, 44 Ga. 123; *Kellogg v. Curtis*, 9 Pick. 634; *Stillwell v. Temple*, 28 Mo. 156; *Reilly v. Jones*, 1 Bing. 302; *Betts v. Burch*, 4 H. & N. 506; *Hinton v. Sparkes*, L. R. 3 C. P. 160; *Leslie v. Macmichal*, 2 N. S. W. 250; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345; *Cæsar v. Robinson*, 71 App. Div. 180, 75 N. Y. Supp. 544.

In *White v. Dingley*, 4 Mass. 433, the plaintiff had given the defendant a license for two years, and covenanted not to sue him within that

time, and that if he should sue him he should be wholly discharged from the claim. The creditor brought suit in violation of the covenant, and the debtor was imprisoned upon the writ, whereupon he brought suit upon the covenant for damages. It was held that the action could not be maintained; the forfeiture was a liquidation of the damages. *Upham v. Smith*, 7 Mass. 265.

In an action to recover damages for breaking up a highway the defendant gave the plaintiff a *cognovit* to confess judgment for £200, with a defeasance that no execution should issue if the defendant, within a limited time, should reinstate the road according to certain specifications. The road not being completely reinstated within the time prescribed, the plaintiff sued out execution and levied the £200 and costs. Held, that the £200 was in the nature of a penalty, and not of stipulated damages; and the court referred it to a prothonotary to ascertain what damages the plaintiff had actually sus-

this nature and valid which provide a particular method of proof; as that property covered by insurance, if afterwards destroyed by fire, shall be estimated by a particular [477] standard,<sup>1</sup> or by a designated person.<sup>2</sup> An agreement between a broker and a farmer, the former having advanced money to the latter to raise a crop, for the repayment of such money, with interest, and to ship to the broker a certain number of bales of cotton to be sold by him, or, in default, to pay the customary broker's commission on such bales as he failed to ship, is for liquidated damages, it not being shown to be a cover for usury.<sup>3</sup> Where a part of the work required to be done under a contract which provided for stipulated damages in consequence of delay was sublet and both the contractor and the subcontractor were in default, the clause providing for such damages was binding on the latter, and each was responsible for the proportion of the damages his delay caused.<sup>4</sup> A condition in a contract extending municipal aid to a railroad company that if it should cease to remain independent for a

tained, and what sum he was entitled to recover from the defendant for his failure to reinstate the road. *Charrington v. Laing*, 3 M. & P. 587.

Where the intention of the parties is potential, the circumstance that the sum is deposited with a stakeholder to be paid over, or in the hands of the opposite party, with a stipulation that it is to be forfeited in the event of a breach, is pointed out as stronger evidence of an intention to make it liquidated damages than the words or nature of the contract otherwise would. *Magee v. Lavell*, L. R. 9 C. P. 107; *Betts v. Burch*, 4 H. & N. 506; *Hinton v. Sparkes*, L. R. 3 C. P. 160; *Wallis v. Smith*, 21 Ch. Div. 243.

A contract which provides that if it shall be broken by either of the parties to it the party who commits the breach shall pay such sum as the other party would have received if it had been observed, and that the average yearly receipts shall be the

basis on which the sum to be paid shall be determined, does not provide for liquidated damages, but fixes the basis on which the actual damages shall be ascertained. *Tufts v. Atlantic Tel. Co.*, 151 Mass. 269, 23 N. E. Rep. 844.

<sup>1</sup> *Ætna Ins. Co. v. Johnson*, 11 Bush, 587, 21 Am. Rep. 223; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 208, 78 Am. Dec. 418; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Bodine v. Glading*, 21 id. 50, 59 Am. Dec. 749; *Irving v. Manning*, 6 C. B. 391; *C. H. Brown Banking Co. v. Baker*, 74 S. W. Rep. 454, — Mo. App. —.

<sup>2</sup> *Faunce v. Burke*, 16 Pa. 479; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Wells v. Smith*, id. 78; *Barnet v. Passumpsic Turnpike Co.*, 15 Vt. 757; *City Bank v. Smith*, 3 G. & J. 265.

<sup>3</sup> *Blackburn v. Hayes*, 59 Ark. 366, 27 S. W. Rep. 240.

<sup>4</sup> *Chicago Bridge & Iron Co. v. Olson*, 80 Minn. 523, 83 N. W. Rep. 461.

stated time the money paid should be returned, provides for liquidated damages.<sup>1</sup>

Where the stipulation was to pay five dollars per day for every car delayed beyond the specified date the court refused to exclude Sunday from the computation. This general rule was laid down: In the computation of rents, interest, damages, or any other amounts in which the day, the week, the month, or any other fixed period of time is the agreed standard of measurement, every intervening Sunday, as well as every secular day, must be included and counted in the reckoning.<sup>2</sup>

§ 282. **Alternative contracts.** These are such as by their terms may be executed by doing either of several acts at the election of the party from whom performance is due. Completion in one of the modes is a performance of the entire contract; and no question of damages arises. Such a contract, therefore, is not one for liquidated damages.<sup>3</sup> Where by the condition of a bond the obligor might, by paying \$600 in twelve, or \$400 in six, months, become the owner of a patent right for a specified district, or otherwise should account for a certain share of the profits, he had a choice of those alternatives for those periods.<sup>4</sup> Stipulating the damages and promising to pay them in case of a default in the performance of an otherwise absolute undertaking do not constitute an alternative contract.<sup>5</sup> The promisor is bound to perform his contract, though there is generally a practical option to violate it and take the consequences; but he is not entitled to an election to pay the liquidated damages and thus discharge himself. A contract stipulating that drainage works shall be completed in all respects and cleared of all implements, tackle, impediments,

<sup>1</sup> *Hamilton County v. Grand Trunk R. Co.*, 19 Ont. App. 252.

<sup>2</sup> *Pressed Steel Car Co. v. Eastern R. Co.*, 121 Fed. Rep. 609, 619 (Ct. Ct. of Appeals, 8th Ct.).

<sup>3</sup> *Strickland v. Williams*, [1899] 1 Q. B. 382; *Salem v. Anson*, 40 Ore. 339, 345, 67 Pac. Rep. 190, 56 L. R. A. 169; *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. Rep. 690, 10 L. R. A. 768.

<sup>4</sup> *McNitt v. Clark*, 7 Johns. 465; *Fisher v. Shaw*, 42 Me. 32; *Slosson v. Beadle*, 7 Johns. 72; *Mercer v. Ir-*

*ing*, 1 E. B. & E. 563; *Reynolds v. Bridge*, 6 E. & B. 528; *Choice v. Moseley*, 1 Bailey, 136, 19 Am. Dec. 661.

<sup>5</sup> *Stewart v. Bedell*, 79 Pa. 336; *People v. Central Pacific R. Co.*, 76 Cal. 29, 34, 18 Pac. Rep. 90; *Crane v. Peer*, 43 N. J. Eq. 553, 4 Atl. Rep. 72, quoting the text and examining a large number of cases. Compare *Hahn v. Concordia Society*, 43 Md. 460. And see *Indianola v. Gulf*, etc. R. Co., 56 Tex. 594.

and rubbish on or before a date fixed, and that in default of such completion the contractor shall forfeit and pay 100% and 5% for every seven days during which the works shall be incomplete after the said time as and for liquidated damages, provides for such payment only in a single event, the non-completion of the works.<sup>1</sup> A bond conditioned for the defendant's obedience to a perpetual injunction restraining him from trespassing on the lands of the plaintiff or the walls, gates or fences thereof, or inclosing the same, and from pulling down or removing or otherwise injuring the same, or inciting others to commit any such trespasses, depends upon one condition only — a breach of the injunction — and the sum designated in it was liquidated.<sup>2</sup> A party agreed to pay \$350 for certain real estate, and paid down a small part. On full performance the promisee was to procure for the promisor, as purchaser, a deed from a third person; it was also agreed that if the purchaser should fail to perform the contract or any part of it, he should pay the other party \$25 as liquidated damages, and immediately surrender possession. A tender of that sum and of possession was made before suit brought for the remainder of the purchase-money, and it was unsuccessfully contended in behalf of the purchaser that he was entitled by the terms of the [478] contract to relieve himself by those acts from its obligation.<sup>3</sup> On entering the service of a bank the defendant executed a

<sup>1</sup> *Law v. Local Board of Redditch*, [1892] 1 Q. B. Div. 127; *Townsend v. Toronto, etc. R. Co.*, 28 Ont. 195.

A physician who goes to a specialist in his profession for treatment and is told that, in the event of a cure, he would require either a certificate of his skill and proficiency as a specialist or \$5,000 in cash, is liable for the latter sum, having refused to give the certificate after assenting to the terms proposed. The court considered the question as depending upon whether the contract provided for a penalty or liquidated damages. *Burgoon v. Johnson*, 194 Pa. 61, 45 Atl. Rep. 65.

<sup>2</sup> *Strickland v. Williams*, [1899] 1 Q. B. 382.

<sup>3</sup> *Ayres v. Pease*, 12 Wend. 393; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. S.) 266; *Long v. Bowring*, 33 Beav. 585; *Howard v. Hopkyns*, 2 Atk. 371; *Dike v. Greene*, 4 R. I. 285; *Dooley v. Watson*, 1 Gray, 414; *Gray v. Crosby*, 18 Johns. 219; *Sainter v. Ferguson*, 7 C. B. 716; *Hobson v. Trevor*, 2 P. Wms. 191; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Ingledew v. Cripps*, 2 Ld. Raym. 814; *Preble v. Boghurst*, 1 Swanst. 580; *Sloman v. Walter*, 1 Brown Ch. 418; *Lampman v. Cochran*, 16 N. Y. 275; *Ward v. Jewett*, 4 Robert. 714; *Robeson v. Whitesides*, 16 S. & R. 320; *Robinson v. Bakewell*, 25 Pa. 424; *Cartwright v. Gardner*, 5 Cush. 273.

bond in the penal sum of 1,000 $\frac{1}{2}$ %, its condition being that it should be void if he discharged his duties in the manner stipulated, and if he should pay the plaintiffs a like sum in case he should at any time within two years after leaving their service accept employment in any other bank within a distance of two miles. This condition was violated. It was held that the obligation could not be satisfied by paying the sum mentioned; there was an agreement implied from the bond that the defendant should not enter the service of a rival bank, which agreement would be enforced by a court of equity.<sup>1</sup> Such courts may enforce performance, or enjoin those acts that would be a violation,<sup>2</sup> but in such cases the equitable is an elective, not a cumulative, remedy. Before granting such relief equity will require the plaintiff to forego the legal claim to the stipulated damages.<sup>3</sup>

**§ 283. Liquidated damages contradistinguished from penalty.** The most important and difficult question in respect to a sum stated in connection with a breach of contract is whether it is liquidated damages or penalty. If the latter, it is not an actual debt; it cannot be recovered, but only the real damages, which have to be proved; and the statement of the agreement in the contract is of very little consequence. If the former, it is the precise sum to be recovered on proof of a breach of the undertaking to which it refers, and no evidence of the manner and extent of the real injury is necessary.<sup>4</sup>

<sup>1</sup> *National Provincial Bank v. Marshall*, 40 Ch. Div. 112.

<sup>2</sup> Cases cited in the two preceding notes.

<sup>3</sup> *Howard v. Hopkins*, 2 Atk. 371; 1 Story's Eq., §§ 717*a*, 793*f*; 3 Par. on Cont. 356, note *g*; *Gordon v. Brown*, 4 Ired. Eq. 399; *Dooley v. Watson*, 1 Gray 414; *French v. Macale*, 2 Drury & W. 269; *Long v. Bowring*, 33 Beav. 585. See § 298.

<sup>4</sup> *Salem v. Anson*, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169; *Hennessey v. Metzger*, 152 Ill. 505, 38 N. E. Rep. 1058, 43 Am. St. 267; *McCann v. Albany*, 158 N. Y. 634, 53 N. E. Rep. 673; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. Rep. 196; *Kelley v. Seay*,

3 Okl. 527, 41 Pac. Rep. 615; *St. Louis, etc. R. Co. v. Shoemaker*, 27 Kan. 677; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. Rep. 956, 6 L. R. A. 551; *Spicer v. Hoop*, 51 Ind. 365; *Wood v. Niagara Falls Paper Co.*, 121 Fed. Rep. 818 (Ct. Ct. of Appeals, 2d Circuit). See § 279 for other cases.

In some of the cases the qualification is added that the damages must be beyond nominal. That theory probably originated in *Hathaway v. Lynn*, *supra*. Doubt as to its being sound was expressed in the second edition of this work. Since its publication that doubt has been approved by several courts. The contrary rule was held prior to that

The decision of this question is often intrinsically difficult, for judicial opinions, in the numerous cases on the subject, are very inharmonious; they furnish no universal test or guide. But, as was said by Christiancy, J.: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case."<sup>1</sup> "The question whether a sum named in a contract to be paid for a failure to perform," said Earl, J., "shall be regarded as stipulated damages or a penalty, has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they have made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made."<sup>2</sup>

time in *Kelso v. Reid*, 145 Pa. 606, 27 Am. St. 716, 23 Atl. Rep. 323, and in *Spicer v. Hoop*, 51 Ind. 365. If the money deposited is to be treated as liquidated damages proof of damage because of the breach of contract need not be made. "The case of *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. Rep. 956, 6 L. R. A. 551, announcing a contrary rule, does not commend itself to our judgment." *Sanford v. First Nat. Bank*, 94 Iowa, 680, 63 N. W. Rep. 459; *Smith v. Newell*, 37 Fla. 147, 20 So. Rep. 249.

<sup>1</sup> *Jaquith v. Hudson*, 5 Mich. 123.

<sup>2</sup> *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 145; *Cæsar v. Robinson*, — N. Y. —, 67 N. E. Rep. 58; *Butler v. Wallbaum Stone & Mining Co.*, 47 Ill. App. 153; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345; *Allison v. Dunwoody*, 100 Ga. 51, 28 S. E. Rep. 651; *Salem v. Anson*, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169, citing the text; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. Rep. 760; *Lennon v. Smith*, 14 Daly, 520.

The question whether the amount

The general tendency toward "judicial expansion," which has been a marked characteristic of recent years, has increased the uncertainty involved in this branch of the law of damages. That uncertainty was never absent; but it has become so great that it is practically, if not actually, impossible to formulate a rule which will be recognized in any considerable number of cases. While the judicial tendency to paternalism is marked, there is abundant evidence to warrant the conclusion that business men are much more inclined than formerly to stipulate their liability if there shall be failure to perform their contracts. Why the courts are more than ever disposed to deny the same freedom of contract in this respect that is unhesitatingly recognized in other departments of law and business it is difficult to say. Notwithstanding the deplorable state of the decisions it may be assumed, first, that if, by the terms of the contract, a greater sum is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to such terms and the stipulated damages are unconscionable, the latter will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for the breach of a contract.<sup>1</sup>

[479] It has been often declared judicially that a stipulation in a contract for the payment of a stated sum, in the event of a breach, should be interpreted, like all its other provisions, with a view to carrying into effect the intention of the parties. Referring to this subject Nelson, C. J., said: "A court of law

stated in a conditional bond or contract is to be taken as a penalty or a liquidation of damages arising from a breach of the condition is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination will be considered the relation which the sum stipulated bears to the extent of the injury which may

be caused by the several breaches provided against, the ease or difficulty of measuring a breach of damages, and such other matters as are legally or necessarily inherent in the transaction. The concurrent declarations of the parties are inadmissible, except to show mistake or fraud, *March v. Allabough*, 103 Pa. 335.

<sup>1</sup> *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. Rep. 805; *Law v. Local Board of Redditch*, [1892] 1 Q. B. 127.



possesses no dispensing power; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract, within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement.”<sup>1</sup> Best, C. J., said at *nisi prius*: “The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether the contract be under seal or not, if it states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in the action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of the instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses.”<sup>2</sup> Equally emphatic language is to be found in other cases.<sup>3</sup>

In this connection language employed by the supreme court of the United States in a case<sup>4</sup> ruled in 1902 is pertinent as indicating a larger regard for the contractual rights of parties than is manifested in many of the recent decisions. The contention made was that where actual damages can be assessed from the testimony the court must disregard any stipulation fixing the amount and require proof of the damage sustained.<sup>5</sup>

<sup>1</sup> *Dakin v. Williams*, 17 Wend. 447.

<sup>2</sup> *Crisdee v. Bolton*, 3 C. & P. 240.

<sup>3</sup> *Dwinel v. Brown*, 54 Me. 468;

*Brewster v. Edgerly*, 13 N. H. 275;

*Clement v. Cash*, 21 N. Y. 253; *Yet-*

*ter v. Hudson*, 57 Tex. 604; *May v.*

*Crawford*, 142 Mo. 390, 44 S. W. Rep.

260; *Emack v. Campbell*, 14 D. C.

App. Cas. 186; *Knox Rock Blasting*

*Co. v. Grafton Stone Co.*, 64 Ohio St.

361, 60 N. E. Rep. 563.

<sup>4</sup> *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

<sup>5</sup> *Chicago House-Wrecking Co. v.*

*United States*, 106 Fed. Rep. 385, 389,

45 C. C. A. 343, and *Gay Manuf. Co.*

*v. Camp*, 25 U. S. App. 184, 65 Fed.

Rep. 794, 68 id. 67, 15 C. C. A. 226,

were relied upon.

The court said: We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court. . . . The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not, *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. . . . In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if it had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation of the agreement. . . . The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a sale thereof, or on being solicited to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant, he is at liberty to refuse to enter into a contract for its acqui-

sition. But if he does contract and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value.<sup>1</sup>

Heretofore such views have been given but a limited practical application; and cases abound in which strong language of a different tenor is employed. "They mistake," says Scott, J., "the object and temper of our system of jurisprudence, who, while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would demand our respect, or secure our willing obedience, which did not [480] to some extent provide against the mischiefs resulting from improvidence, carelessness, inexperience and undue expectations on one side, and skill, avarice and a gross violation of the principles of honesty and fair dealing on the other. The folly of one making a wild and reckless stipulation will not justify gross oppression in another. A just man, when he sees one in a situation in which he is prepared to make a contract which must grind and oppress him, will not take advantage of his state of mind and enrich himself by his folly and want of experience. It has been remarked that in reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act — the real object of the parties being the performance of the act — that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party."<sup>2</sup>

The trend of judicial thought and action on the subject is well and frankly expressed by Justice Marshall of the Wisconsin court: The law is too well settled to permit any reasonable controversy in regard to it at this time, that where parties stipulate in their contract for damages in the event of a

<sup>1</sup> See *Wood v. Niagara Falls Paper Co.*, 121 Fed. Rep. 818 (Ct. Ct. of Appeals, 2d Circuit).

<sup>2</sup> *Basye v. Ambrose*, 28 Mo. 39; *Ja-*

*quith v. Hudson*, 5 Mich. 123; *Schrimpf v. Tennessee Manuf. Co.*, 86 Tenn. 219, 6 Am. St. 832, 6 S. W. Rep. 131.

breach of it, using appropriate language to indicate that the damages are agreed upon in advance, and such damages are unreasonable considered as liquidated damages, the stipulated amount will be considered to be a mere forfeiture or penalty and the recoverable damages be limited to those actually sustained. While courts adhere to the doctrine that the intention of the parties must govern in regard to whether damages mentioned in their contract are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity between parties, guided of course by precedents that are considered to have the force of law, sometimes calling that a penalty which the parties call stipulated damages, where otherwise an unconscionable advantage would be obtained by one person over another. The judicial power thus exercised cannot properly be justified under any ordinary rules of judicial construction. Such rules permit courts to go as far as possible to effect the intent of the parties where it is left obscure by their language so long as such intent can be read out of the contract without violating the rules of language or law. But in determining whether an amount agreed upon as damages was intended as liquidated damages or as a penalty, rules of language are ignored and the express intent of the parties is made to give way to the equity of the particular case, having due regard to precedents.<sup>1</sup>

As is remarked in the last paragraph, the intention of parties on this subject, under the artificial rules that have been adopted, is determined by very latitudinary construction.<sup>2</sup> To

<sup>1</sup> *Seeman v. Biemann*, 108 Wis. 365, 373, 84 N. W. Rep. 490.

<sup>2</sup> In each case we must look to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and all its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case. *Clements v. Schuykill*, etc. R. Co., 132 Pa. 445, 19 Atl. Rep. 274.

Where the damages resulting from a breach of the agreement were evidently the subject of calculation and adjustment between the parties and a certain sum was agreed on and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages; but though the intention of the parties seems clear and manifest that a breach shall operate as a complete forfeiture of the entire sum named in the agreement, the court will decline to render its assistance

be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive.

to enforce the payment of an amount which is grossly excessive, unreasonable and unjust, and will treat the stipulation as in the nature of a penalty and will award only such damages as the injured party may have actually sustained. *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345.

In determining whether an amount named in a contract is to be taken as penalty or liquidated damages, courts are influenced largely by the reasonableness of the transaction and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; and conversely, where the contract has called it a penalty, it has been held to be liquidated damages; and again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as it was right and reasonable. *Davis v. United States*, 17 Ct. of Cls. 201, 215. See *Beeman v. Hexter*, 98 Iowa, 378, 67 N. W. Rep. 270.

The term "estimated damages" is equivalent to "liquidated damages." *Gallo v. McAndrews*, 29 Fed. Rep. 715.

The words "shall act as a forfeiture and shall be forfeited" have been construed to provide for liquidated damages. *Eakin v. Scott*, 70 Tex. 442, 7 S. W. Rep. 777.

"To forfeit" is equivalent to "to pay." *Streeper v. Williams*, 48 Pa. 450.

"Forfeiture" is synonymous with

"penalty." *Muldoon v. Lynch*, 66 Cal. 536. But it will be presumed, in order to effectuate the intention of the parties, that the word "forfeit" was used in a conversational sense. *Maxwell v. Allen*, 78 Me. 32, 57 Am. Rep. 783, 2 Atl. Rep. 386; *Lynde v. Thompson*, 2 Allen, 456.

A penalty is not necessarily to be understood from the use of the word "forfeit;" the circumstances must be considered. *Claude v. Shepard*, 122 N. Y. 397, 400, 25 N. E. Rep. 358; *Womack v. Coleman*, — Minn. —, 93 N. W. Rep. 663 (the language was "shall be absolute forfeiture and indemnity"); *Chatterton v. Crothers*, 9 Ont. 683; *Tinkham v. Satori*, 44 Mo. App. 659. Nor is an instrument using the words "penalty" or "forfeit" to be always construed as providing for a penalty. *Lipscomb v. Seegers*, 19 S. C. 425, 434.

In other cases "penalty" and "forfeit" have been given their usual signification. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Laurea v. Bernauer*, 33 Hun, 307.

A penalty is implied from the language "and each party is hereby held and fully bound in the sum of \$300 for the faithful fulfillment of the above contract." *Moore v. Colt*, 127 Pa. 289, 14 Am. St. 845, 18 Atl. Rep. 8.

A clause in a charter-party by which the parties bind themselves "in the penal sum of estimated amount of freight" is a penalty. *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. Rep. 91. But if the sum is mentioned as a penalty and the instrument uses the words "which sum is hereby named as stipulated damages," the latter expression will control. *Tode v. Gross*, 22 N. Y. St.

Parties may liquidate the amount by previous agreement. But when a stipulated sum is evidently not based on that principle, the intention to liquidate will either be found not to exist or will be disregarded and the stated sum treated as a

Rep. 818, 4 N. Y. Supp. 402; *Ward v. Hudson River B. Co.*, 24 N. Y. St. Rep. 347, 5 N. Y. Supp. 319. And so where the language is that the parties "bind themselves in the penal sum" of "as fixed and settled damages to be paid by the failing party." *Parr v. Greenbush*, 43 Hun, 232.

The use of the words "liquidated damages" will not control the construction if the court can find in the whole instrument reason to doubt that it was the intention of the parties to so contract. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Wolf v. Des Moines R. Co.*, 64 Iowa, 380, 20 N. W. Rep. 481; *Ex parte Pollard*, 2 Low. 411, 17 Nat. Bank. Reg. 229; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. Rep. 829, 13 L. R. A. 671. See § 284.

An agreement to pay \$500, besides all damages sustained, provides for a penalty. *Foote & Davies Co. v. Malony*, 115 Ga. 985, 42 S. E. Rep. 413. See *Dwinel v. Brown*, p. 726, n.

In *Pierce v. Jung*, 10 Wis. 30, *Paine, J.*, said: "The opinions on this subject are conflicting. On the one hand, they lean towards treating such provisions as in the nature of penalties, and to do so have sometimes disregarded the positive and implicit language of the parties. On the other, they go for upholding contracts as made, treating the parties as equally competent to provide for the amount of damages to be paid in case of a failure to perform as to determine any other matter contained in them. The case of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farrel*, 6 Bing. 141, are strong illustrations of the first class; and in *Crisdee v. Bolton*, 3 C. & P. 240, the

opposite doctrine is very clearly stated. But even the first class of cases concede the power of the parties to liquidate the damages by their agreement in case of a non-performance. And they profess also to go upon the intention of the parties. And perhaps the only real difference between the two is that the former takes greater liberties than the latter with the words of the parties in determining what the intention is. They pay more attention to the whole nature and object of the agreement than to the precise words in determining whether the intent was to create a penalty or provide for liquidated damages."

In *Beale v. Hayes*, 5 Sandf. 640, *Duer, J.*, said: "It is not always, however, that damages are to be construed as liquidated because the parties have declared them to be so. The language of the parties (to the agreement in question) is clear and emphatic that the sum of £3,000 shall be recoverable from the party making default as and for liquidated damages; yet no court of justice, without an entire disregard of prior decisions, can give effect to the apparent intention of the parties by adopting that construction of their agreement which the terms they have used so forcibly suggest. . . . When consequences so unreasonable would follow, the law presumes that they must have been overlooked by the parties, and therefore mercifully gives to their language an interpretation which excludes them. When it would be plainly unconscientious to exact a large sum for a trivial breach, even a court of law, acting upon a principle of equity, will re-

penalty. Contracts are not made to be broken; and hence, when parties provide for the consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum to be paid absolutely. The intention

lease the parties from the literal obligation which their language imports."

In *Jaquith v. Hudson*, 5 Mich. 123, Christiancy, J., said: "It is true the courts in nearly all these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious from these cases that wherever it has appeared to the court from the face of the contract and the subject-matter that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the *negation* of one necessarily implies the *existence* of the *other*, there would seem to be no room left for construction with reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not the governing consideration.

"But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring in substance that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still,

if it appear clearly by reference to the subject-matter that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

"Now this, it is true, may lead to the same result in the particular case as to have placed the decision upon the true ground, viz.: that though the parties actually intended the sum to be paid as the damages agreed between them, yet it being clearly unconscionable, the court would disregard the intention and refuse to enforce the stipulation. But, as a rule of construction or interpretation of contracts, it is radically vicious and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they in the most unambiguous terms have declared it to be, and finds an intention directly opposite to that which is clearly expressed — '*divinatio, non interpretatio est, quæ omnino recedit a litera.*'"

"Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that if the intention to make the sum stipulated damages should

in all such cases is material; but to prevent a stated sum from being treated as a penalty the intention should be apparent to liquidate damages in the sense of making just compensation; it is not enough that the parties express the intention

clearly appear the court would enforce the contract according to that intention. To test this, let it be asked whether in such a case if it were admitted that the parties actually *intended* the sum to be considered as *stipulated damages* and *not* as penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the *names* of things, and enforcing *under the name of* [483] *stipulated damages* what in its *own nature* is but a *penalty*.

"The real question in this class of cases will be found to be, not what the parties *intended*, but whether the sum is *in fact in the nature* of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must therefore, we think, be very obvious that the actual intention of the parties in this class of cases and relating to this point is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is *not* and *cannot be made the real basis of these decisions*. In endeavoring to reconcile these decisions with the act-

ual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Flintoff*, 9 M. & W. 678, per Parke, B. May it not be said, with at least equal propriety, that courts have sometimes said what they *did not exactly mean*? The foregoing remarks are all to be confined to that class of cases where it was clear from the sum mentioned and the subject-matter that the principle of compensation had been disregarded."

In *Dwinel v. Brown*, 54 Me. 468, the defendant had bound himself, in the event of a failure to perform each and every condition and stipulation represented in a certain license and agreement for carrying on a lumbering operation upon the plaintiff's land, "in the full and liquidated sum of \$1,000 well and truly to be paid," on demand, "over and above the actual damages" which should be sustained by the non-performance. *Dickerson, J.*, said: "The question presented for our determination is whether the sum named in the contract to be paid by the defendant on his failure to fulfill its conditions is penalty or liquidated damages. It is competent for the parties in making a contract to leave the damages arising from a breach of its provisions to be determined in a court of law, or to specify the amount of such damages in the contract itself. If the contract is silent in respect to damages, the law will allow only the actual or proximate damages. In order, however, to provide for con-



that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it shall be paid; it is intrinsically a different thing, and the intention that it shall be paid cannot

sequential damages or secure the profits which are expected to arise from business, or contracts that depend upon the performance of the principal contract, or to save expense, or to render certain what would otherwise be difficult if not impossible to ascertain, it is sometimes desirable that the contract should fix the amount of damages. If, for instance, a party has a contract for building a ship at a large profit, conditioned upon his having her completed at a specified time, it would be competent for him in contracting for the material to make the damages, in case of breach, sufficient to cover his prospective profits in building the ship. While to persons unacquainted with the circumstances [484] stances the damages stipulated in such a contract might seem greatly disproportionate to the loss sustained by a breach of it, they might, in fact, be insufficient to indemnify the party against the loss he might sustain by being prevented from completing the ship according to his contract. The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce the agreement as it is the other provisions of the contract. As in construing the other parts of the contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. The inquiry is, what was the understanding of the parties; and when it is

said in judicial parlance that certain language of the parties is held to mean liquidated damages and certain other language a penalty, this is affirmed of the intention of the parties, and not of the construction of the court, in contradistinction from such intention. It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract is made, scan the motives and weigh the considerations which influenced them in the transaction so as to determine what would have been best for them to do; who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud and illegality.

"The controversy in the courts, whether the particular language of a contract in regard to damages is to be construed as a penalty or liquidated damages, arises mainly from a desire to relieve parties from what, under a different construction, is assumed to be an imprudent and ab-

alter its nature. A bond, literally construed, imports an intention that its penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the

surd agreement. When, however, it is considered how little courts know of the modifying circumstances of the case, how far the particular provision was framed with reference to the personal feelings of the parties, what fluctuations in the market were anticipated at the time and what effect the contract in question was expected to have upon other business engagements or negotiations, there is perhaps less cause for departing from the literal construction of the language used than might at first view be supposed. These considerations should at least admonish us that in straining the language of a contract to prevent a seeming disadvantage to one of the parties, we *may* impose upon the other party the very hardships which both intended to protect him against by the terms of their agreement. The interests of the public are quite as likely to be subverted in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean [485] what is not apparent upon the face of it to save a party from some conjectural inequity growing out of his supposed inadvertence or improvidence." The judge stated three rules upon which he said the courts are substantially agreed, and the *third* he stated as follows: "If the instrument provides for the payment of a larger sum in future to pay a less sum, the larger will be regarded as penalty in respect to the excess over the legal interest whatever the language used; and if the contract consist of several stipulations, the damages for the breach of which independently of the sum

named in the instrument are uncertain and cannot well be ascertained, the sum agreed upon is to be treated as liquidated damages. *Orr v. Churchill*, 1 H. Bl. 227; *Astley v. Weldon*, 2 B. & P. 346; *Mead v. Wheeler*, 13 N. H. 351; *Atkins v. Kinnier*, 4 Ex. 776. . . .

"In the case at bar the defendant bound himself 'in the full and liquidated sum of \$1,000 over and above the actual damages' in the event of his failure to do and perform each and every condition and stipulation in his contract. Language can scarcely make the intention of the parties to fix the amount of the damages more clear and emphatic. The sum is not only 'liquidated,' but, as if to exclude all possibility of its being a penalty, it is declared to be 'over and above the actual damages.' Whether it was to afford an additional stimulus to secure the fulfillment of the contract, or to provide against all other losses, or compensate for other advantages contingent upon this contract, or from the difficulty of ascertaining the actual damages, or for some other reason, it is manifest that other damages than the legal damages were taken into the account by the parties when they incorporated this provision in their agreement. Besides, the contract contains several distinct conditions and requirements for the fulfillment of which, respectively, no sum is specified; and it is impossible to ascertain such damages from the very nature of these stipulations. What actual damages would result to the plaintiff solely from the defendant's omission to land the logs at a suitable place, or to notify the

same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when

scaler seasonably, or to mark the logs, or drive them as early as practicable, or to cut clear without waste, or to perform the dozen other stipulations of the contract, is practically beyond the power of a judicial tribunal to ascertain with anything like accuracy. The case clearly comes within the second clause of the third rule of interpretation, that when parties incorporate several distinct stipulations in a contract, the breach of which cannot be respectively measured, they must be taken to have meant that the sum agreed upon was to be liquidated damages and not a penalty. That such was the intention of the parties, moreover, as drawn from the particular language of the contract upon this point, cannot admit of a doubt."

The stipulation in this case is so expressed that it would seem not to have been intended to provide the fixed sum, in lieu of actual damages difficult of proof, but a comminatory sum in addition. The dissenting opinion of Appleton, C. J., is believed to contain a sounder exposition of the contract and the law applicable to it: "In case of a contract damages are the pecuniary satisfaction to which the injured party is entitled by way of compensation for its breach. *Liquidated damages are damages agreed upon by the parties, as and for a compensation for and in lieu of the actual damages arising from such breach.* They may exceed or fall short of the actual damages — but the sum thus fixed and determined binds the parties to such agreement. When this sum is paid all damages are paid. In the case at bar the sum of \$1,000 was not liqui-

dated damages. It was not for damages at all. The contract so expressly and unqualifiedly states it. It was a sum 'over and above the actual damages.' The plaintiff, by its terms, was further entitled to recover the 'actual damage' which he might sustain by 'the non-performance of any agreement hereinafter contained.' Suppose the actual damages were \$5,000, would not the plaintiff be entitled to recover that sum? Most assuredly. The actual damages are therefore excluded from the sum of \$1,000, and yet remain to be assessed. . . . Liquidated damages are fixed, settled and agreed upon in advance, to avoid all litigation as to those actually sustained. They are a compensation for and in lieu of actual damages, never in addition thereto. The language of the agreement leaves no room for any other conclusion than that the sum fixed is a penalty. It is not for damages by the terms of the contract. It is not, therefore, a sum agreed upon in liquidation of damages, but is a penalty and so must be regarded." *Gowen v. Gerrish*, 15 Me. 273; *Gamon v. Howe*, 14 Me. 250.

In *Chamberlain v. Bagley*, 11 N. H. 234, Upham, J., said: "Courts, from a desire to avoid cases of seeming hardship, have in many instances made decisions disregarding the evident intent and design of the parties to contracts; and a variety of reasons have been assigned for this course. . . . We see no reason why contracts of this kind should not be judged of by the rules of construction as other contracts; or why a technical, restricted meaning should be given to particular phrases without reference to other portions

the amount stated varies materially from a just estimate of the actual loss finally sustained.<sup>1</sup> If a contract provides for a penalty for the breach of some of its provisions it must be re-

of the instrument to learn the design of the parties. The modern decisions upon this subject have turned on the construction of the agreement according to the general intent. In *Reilly v. Jones*, 8 Moore, 244, it is said that where it may be fairly collected that the intent of the parties was that the damages stipulated for, as between themselves, were to be considered as liquidated they cannot be treated as a penalty although they might operate as such in a popular sense. . . . The words forfeit or forfeiture, penal sum or penalty, have in some instances been regarded as furnishing a very strong, if not conclusive, indication of the intention of the parties in an instrument of this description; but the weight to be given to such phraseology will depend entirely on its connection with other parts of the instrument. If an individual promises to pay the damage which may be incurred *under* a given penalty, or *un-*

*der* a forfeiture, the *damage* only in such case is agreed to be paid. On the other hand, the penalty may be expressly agreed to be paid in such terms as to admit of no doubt that such was the intent of the parties; and where such is the case, notwithstanding it may be named as a forfeiture, or the parties are spoken of as bound in a certain sum, if it was clearly the design of the parties that such sum should be paid, it is [487] holden in the more modern decisions as liquidated damages."

In *Brewster v. Edgerly*, 13 N. H. 275, the same doctrine is affirmed. Gilchrist, J., said: "Many of the decisions of the judicial tribunals heretofore have been based upon what is now admitted to be an insecure foundation; for the judgments have often proceeded not upon the plainly expressed intention of the parties in a case free from fraud or illegality, but upon the view which the court entertained of what would have been

<sup>1</sup> *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. Rep. 417, quoting the text and pronouncing it a clear statement of the result of the decisions; *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. Rep. 379; *Condon v. Kempér*, 47 Kan. 126, 27 Pac. Rep. 829, 13 L. R. A. 671, quoting the text; *Doane v. Chicago City R. Co.*, 51 Ill. App. 353; *Iroquois Furnace Co. v. Wilkin Manuf. Co.*, 181 Ill. 582, 54 N. E. Rep. 987; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. Rep. 774, 55 Am. St. 339; *Cochran v. People's R. Co.*, 113 Mo. 359, 21 S. W. Rep. 6; *Schmieder v. Kingsley*, 6 N. Y. Misc. 107, 26 N. Y. Supp. 31; *Lindsay v.*

*Rockwall County*, 10 Tex. Civ. App. 225, 30 S. W. Rep. 380; *Haliday v. United States*, 33 Ct. of Cls. 453; *Quinn v. United States*, 99 U. S. 30; *Mundy v. United States*, 35 Ct. of Cls. 265; *Cæsar v. Robinson*, — N. Y. —, 67 N. E. Rep. 58; *Rayner v. Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289; *Radloff v. Haase*, 96 Ill. App. 74; *Denver Land & Security Co. v. Rosenfeld Construction Co.*, 19 Colo. 539, 36 Pac. Rep. 146; *Gillilan v. Rollins*, 41 Neb. 540, 59 N. W. Rep. 893; *New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 332, 50 Atl. Rep. 881, 1015; *Zimmerman v. Conrad*, 74 S. W. Rep. 139 (St. Louis Ct. of App.).

garded as so providing if there is a breach of them all; as where the damages resulting from the breach of some of its stipulations are capable of being ascertained. It cannot pro-

on the whole just, considering such circumstances as were proved to exist. The dangerous uncertainty of such a mode is manifest when the impossibility of placing any other person in the exact condition of the parties at the time the contract was made is considered. Many motives influence them, many considerations weigh with them which no other person could understand and appreciate unless he could thoroughly identify himself with the parties; and when the contract, reasonably construed, has a plain meaning that one party shall, in a certain contingency, pay the other party a definite sum, thus relieving him from that liability and making the contract mean something which on its face is not apparent, by assuming that we can place ourselves in the position of the parties, and can then know precisely what would have been equitable for them to do, is nothing else than a rescission of their contract, and a substitution for it of one made by the court. This result the cautious policy of the common law has never recognized as within its powers, nor have the courts ever in terms claimed the right to produce it; still it has sometimes been effected by the anxious desire of the tribunals that the law should not be made the instrument of injustice; forgetting sometimes, perhaps, in this laudable zeal that one of the greatest evils in the administration of justice, and one which brings numberless others in its train, is that feeling of social insecurity which will exist whenever the inviolability of contracts is trenched upon, however pure might have been the motive for so doing." The court seem inclined to think *Kemble*

*v. Farren*, 6 Bing. 141, a case of liquidated damages by reason of the obvious intent of the parties as expressed in the contract. *Mead v. Wheeler*, 13 N. H. 351.

But in *Davis v. Gillett*, 52 N. H. 126, Foster, J., said: "The substance of these principles (laid down by Sedgwick in his treatise on the Measure of Damages) is that the language of the agreement is not conclusive; and that the effort of the tribunal called to put a construction upon it will be to ascertain the true intent of the parties and to effectuate that intent. In order to do this courts will not be absolutely controlled by terms that may seem to be quite definite in their meaning, but will be at liberty to consider and declare a sum mentioned in the bond to be a penalty, even although it may be denominated liquidated damages, and *vice versa*, if manifest justice requires that a construction opposite to the expressed language of the instrument should be adopted. In such cases the court do not assume (as they certainly could not) to make a new contract for the parties; but they conclude that the parties have incorrectly and inconsiderately expressed their intention. The court, therefore, ascertain the intention and then give effect to it."

In *Williams v. Dakin* (court [488] of errors), 22 Wend. 201, Walworth, J., said: "There is undoubtedly a class of cases in which courts have been in the habit of considering a certain specified sum as penalty, whatever may be the language of the agreement. Such is the case whenever such specified sum is evidently intended as a mere collateral security for the payment of a different

vide for a penalty as to those and for liquidated damages as to the other clauses, though the consequences of their breach are uncertain.<sup>1</sup>

sum which is the real debt; or where it was evidently intended to be in the nature of a mere penalty; and there is another class where from the language of the agreement it was difficult to ascertain what the parties really intended, in which the courts have taken the reasonableness of the provision as liquidated damages into consideration for the purpose of determining whether it was intended as such or only as a comminatory sum."

In *Cotheal v. Talmage*, 9 N. Y. 551, the court recognize it as a general rule that courts in acting upon these stipulations should carry into effect the intent of the parties; but there is an intimation that this rule may be departed from when the party might be made responsible for the whole amount of damages supposed to be stipulated for breach of an unimportant part of his contract; "and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained."

In *Lampman v. Cochran*, 16 N. Y. 275, 61 Am. Dec. 716, a sum specially named in an agreement as "liquidated damages," in case either party shall fail to perform the contract, was nevertheless held a penalty, because on the face of the instrument it appeared that such sum would necessarily be an inadequate compensation for the breach of some of the provisions, and more than enough for the breach of others. The court say: "The parties to this contract must be regarded as having given a wrong name to the sum of \$500, and that it is in substance a penalty, and not liquidated damages."

In *Colwell v. Lawrence*, 38 N. Y. 71, Miller, J., said: "One of the rules of construction established is that the courts are to be governed by the intention of the parties to be gathered from the language of the contract itself and from the nature of the circumstances of the case. And in all the cases the courts have treated it as a question as to the intention of the parties." In that case a contract had been made to build and place in a steamboat two steam-engines of a particular description on or before a day specified for \$8,000, and to have the same ready for steam on or before that day "under a forfeiture of \$100 per day for each and every day after the above date until the same is completed as above." Held, the amount being large and grossly disproportionate to the actual damage, it was not a reasonable inference that it was agreed on as liquidated damages.

In *Clement v. Cash*, 21 N. Y. 253, Wright, J., said: "When the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to

<sup>1</sup> *Lansing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 39 id. 149; *Laurea v. Bernauer*, 33 Hun, 307.

### § 284. The evidence and effect of intention to liquidate.

A bond is *prima facie* a penal obligation; but the sum [489] stated where a penalty is usually inserted has sometimes been held liquidated damages.<sup>1</sup> This has seldom been done, how-

agree upon the measure of compensation to the injured party in case of a breach. In such cases there would be room for construction, but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be \$500, or any other sum, to be paid by the party failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended, but that the intention was to name a sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement; still, certain rules have crept into the law that are supposed to control the construction of contracts of this character, until in the view of some it has become difficult, if not impossible, to support an agreement for liquidated damages in cases where the amount ascertained by the parties seems disproportionate to the conjectured actual damage." *Rolf v. Peterson*, 2 Brown, P. C. 470.

If the sum would be very enormous and excessive, considered as liquidated damages, it should be taken to be a penalty though agreed to be paid. *Lord Eldon*, C. J., laments, in *Astley v. Weldon*, 2 B. & P. 346, the adoption of such a principle. *Hoag v. McGinnis*, 22 Wend. 163, per Cowen, J.; *Spencer v. Tilden*, 5 Cow. 144 and note; *Bagley v. Peddie*, 5 Sandf. 192; *Berry v. Wisdom*, 3 Ohio St. 241; *Esmond v. Van Beneschoten*, 12 Barb. 366; *Nash v. Hermosilla*, 9 Cal. 585, 70 Am. Dec. 676;

*Bright v. Rowland*, 3 How. (Miss.) 398; *Shreve v. Brereton*, 51 Pa. 175; *Streeper v. Williams*, 48 id. 450; *Powell v. Burroughs*, 54 id. 329; *Moore v. Anderson*, 30 Tex. 224; *Chase v. Allen*, 13 Gray, 42; *Gowen v. Gerrish*, 15 Me. 273; *Leggett v. Mutual L. Ins. Co.*, 53 N. Y. 394; *Dennis v. Cummins*, 3 Johns. Cas. 297; *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Streeter v. Rush*, 25 Cal. 67.

<sup>1</sup> *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. Rep. 892; *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. Rep. 415; *De Graff v. Wickham*, 89 Iowa, 720, 52 N. W. Rep. 503, 57 id. 420; *Wilkinson v. Colley*, 6 Kulp, 401; *Studabaker v. White*, 21 Ind. 212; *Fisk v. Fowler*, 10 Cal. 512; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348.

It is not to be regarded as a universal rule that contracts in the ordinary form of penal bonds, designed as an indemnity between private persons for the non-performance of collateral agreements, are to be regarded as a penalty. It cannot correctly be said to be true in all such cases that the intention to treat the sum named in the bond as a penalty to secure the performance of the condition and to be discharged on payment of damages arising from non-performance can be inferred as a rule of law or a conclusive presumption from the mere form of the obligation. *Clark v. Barnard*, 108 U. S. 436, 453, 2 Sup. Ct. Rep. 878. See n. to § 283.

The weight to be given the words "forfeit," "forfeiture," "paid sum" or "penalty" will depend on their connection with other parts of the instrument in which they are used.

ever, unless words were employed in connection with that sum to countervail the implication of penalty.<sup>1</sup> And where the parties in any other form of contract designate the stated sum a penalty, or characterize it by other equivalent words, it is an indication that a penalty, in a strict or technical sense, is intended;<sup>2</sup> but the inference is not so strong because the [490] obligation is in the form of a bond as may be inferred from the greater number of instances in which a sum called a penalty or forfeiture by the parties in contracts has been held, nevertheless, liquidated damages. The tendency and preference of the law is to regard a stated sum as a penalty, because

the nature of the agreement, the intention of the parties, and other facts and circumstances. *De Graff v. Wickham*, *supra*; *Dobbs v. Turner*, 70 S. W. 458.

<sup>1</sup> *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Shiell v. McNitt*, 9 Paige, 101; *Leary v. Laffin*, 101 Mass. 334; *Smith v. Wedgwood*, 74 Me. 457.

If a bond which stipulates that the obligor shall abide by the determination of arbitrators contains no express agreement that the sum named in it is to be regarded as liquidated damages, and there is no evidence of an intention that it should be so stated, such sum will be regarded as a penalty. *Henry v. Davis*, 123 Mass. 345.

A stipulation for "a penalty as liquidated damages," held to be the latter. *Toomey v. Murphy*, [1897] 2 Irish, 601.

<sup>2</sup> *Iroquois Furnace Co. v. Wilkin Manuf. Co.*, 181 Ill. 582, 54 N. E. Rep. 987; *Meyer v. Estes*, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. Rep. 683; *McCann v. Albany*, 11 App. Div. 378, 42 N. Y. Supp. 94; *Edgar & Thompson Works v. United States*, 34 Ct. of Cls. 205; *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. Rep. 294; *L. P. & J. A. Smith Co. v. United States*, 34 Ct. of Cls. 472; *Moore v. Colt*, 127 Pa. 289, 18 Atl. Rep. 8;

*Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. Rep. 286, 26 L. R. A. 114; *Dill v. Lawrence*, 109 Ind. 564, 10 N. E. Rep. 573; *March v. Allabough*, 103 Pa. 335; *Whitfield v. Levy*, 35 N. J. L. 149; *Yenner v. Hammond*, 36 Wis. 277; *Taylor v. Sandiford*, 7 Wheat. 13; *White v. Arleth*, 1 Bond, 319; *Smith v. Dickenson*, 3 B. & P. 630; *Davies v. Penton*, 6 B. & C. 216; *Harrison v. Wright*, 13 East, 343; *Brown v. Bel lows*, 4 Pick. 179; *Burr v. Todd*, 41 Pa. 206; *Robinson v. Cathcart*, 2 Cranch C. C. 590; *Bigony v. Tyson*, 75 Pa. 157; *Esmond v. Van Benschoten*, 12 Barb. 366; *Clement v. Cash*, 21 N. Y. 253; *Cheddick v. Marsh*, 21 N. J. L. 463; *Hodges v. King*, 7 Met. 583; *Salters v. Ralph*, 15 Abb. Pr. 273; *Bearden v. Smith*, 11 Rich. 554; *Heatwole v. Gorrell*, 35 Kan. 692. Compare the last case with *Streeter v. Rush*, 25 Cal. 67.

Even if the use of the word "penalty" is not conclusive, very strong evidence is required to authorize a court to say that the parties' own words do not express their intention; the use of that word prevents a court from holding that the parties stipulated the damages. *Smith v. Brown*, 164 Mass. 584, 42 N. E. Rep. 101; *Kelley v. Seay*, 3 Okl. 527, 41 Pac. Rep. 615; *Reno v. Cullinane*, 4 Okl. 457, 46 Pac. Rep. 510.



actual damages can then be recovered, and the recovery be limited thereto.<sup>1</sup> This tendency and preference, however, do not exist where the actual damages cannot be ascertained by any standard. A stipulation to liquidate in such cases is considered favorably.<sup>2</sup> If the amount is not so large as to raise a doubt that it is proportionate to the injury, other circumstances being equal, it is believed the tendency of the judicial mind is to treat a fixed sum as liquidated damages by whatever name it may be mentioned in the contract.<sup>3</sup> Another

<sup>1</sup> *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. Rep. 1058; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. Rep. 774, 55 Am. St. 339; *Williston v. Mathews*, 55 Minn. 422, 56 N. W. Rep. 1112; *Halliday v. United States*, 33 Ct. of Cls. 453; *O'Keefe v. Dyer*, 20 Mont. 471, 52 Pac. Rep. 196, quoting the text; *Iroquois Furnace Co. v. Wilkin Manuf. Co.*, 181 Ill. 582, 54 N. E. Rep. 987; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. Rep. 140, 39 Am. St. 626; *Fisk v. Gray*, 11 Allen, 132; *Lansing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 149; *Burrill v. Daggett*, 77 Me. 545; *Smith v. Wedgwood*, 74 id. 458; *Henry v. Davis*, 123 Mass. 345; *Shute v. Taylor*, 5 Met. 61; *Wallis v. Carpenter*, 13 Allen, 19; *Cheddick v. Marsh*, 21 N. J. L. 463; *Baird v. Tolliver*, 6 Humph. 186, 44 Am. Dec. 298; *Spear v. Smith*, 1 Denio, 464.

It is provided by sec. 961, R. S. of the U. S., that in all suits brought to recover the forfeiture annexed to any articles of agreement, covenant bond or other specialty, where the forfeiture, breach or non-performance appears by the default or confession of the defendant or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain it shall, if either of the parties request it, be assessed by a jury. This has, apparently, been considered appli-

cable to a contract expressly providing for stipulated damages in a case where no material damage to the government was shown to have resulted from the breach of the contract. *Chicago House-Wrecking Co. v. United States*, 45 C. C. A. 343, 106 Fed. Rep. 385. The doctrine of this case, aside from the statute, has been disapproved. *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 660, 22 Sup. Ct. Rep. 240.

<sup>2</sup> *Kelly v. Fejervary*, 111 Iowa, 693, 83 N. W. Rep. 791; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. Rep. 140, 39 Am. St. 626; *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. Rep. 243; *Tennessee Manuf. Co. v. James*, 91 Tenn. 154, 18 S. W. Rep. 262, 30 Am. St. 865, 15 L. R. A. 211, quoting the text; *Jaquith v. Hudson*, 5 Mich. 123; *Duffy v. Shockey*, 11 Ind. 70; *Sparrow v. Paris*, 7 H. & N. 594; *Pierce v. Jung*, 10 Wis. 30; *Cottheal v. Talmage*, 9 N. Y. 551; *Boys v. Ancell*, 5 Bing. N. C. 390; *Richards v. Edick*, 17 Barb. 260; *Noyes v. Phillips*, 60 N. Y. 408; *Harris v. Miller*, 6 Sawyer, 319; *Knowlton v. Mackay*, 29 Up. Can. C. P. 601; *Ivinson v. Althrop*, 1 Wyo. 71; *Williams v. Vance*, 9 S. C. 344; *Birdsall v. Twenty-third St. Ry. Co.*, 8 Daly, 419; *Salem v. Anson*, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169.

<sup>3</sup> *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. Rep. 1058, 43 Am. St. 267;

statement of the rule is that if the language of the parties is clear and explicit to the effect that the sum named is to be deemed liquidated damages and the actual damages contemplated when the contract was made "are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss," effect will be given the contract.<sup>1</sup> But wherever there is doubt as to the justice of the stipulation, if the sum be called a "penalty" in the contract, that circumstance is frequently referred to as a reason for holding it to be a penalty, on the ground of intention. The purpose in such cases, however, is commonly a deduction from the general effect of the contract, and the word "penalty" is alluded to to confirm a foregone conclusion.<sup>2</sup> On the other hand, if the general effect of the contract otherwise leads to the conclusion that the stipulated sum should be held to be a penalty, the circumstance that the parties have called it [491] "liquidated damages," and said they do not mean it as penalty, and even use very clear language that it is to be actually paid, will not control the interpretation; it will, notwithstanding, be considered a penalty.<sup>3</sup> Bonds given to secure

Gates v. Parmly, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739; Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21, 65 N. W. Rep. 863; Half v. O'Connor, 14 Tex. Civ. App. 191, 37 S. W. Rep. 238; Standard Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. Rep. 346; McCurry v. Gibson, 108 Ala. 451, 54 Am. St. 177, 18 So. Rep. 806; Boyce v. Watson, 52 Ill. App. 361; Pastor v. Solomon, 26 N. Y. Misc. 125, 54 N. Y. Supp. 575; Railroad v. Cabinet Co., 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; Jaqua v. Headington, 114 Ind. 309, 16 N. E. Rep. 527; Bird v. St. John's Episcopal Church, 154 Ind. 138, 65 N. E. Rep. 129; Maxwell v. Allen, 78 Me. 32, 57 Am. Rep. 783, 2 Atl. Rep. 386; Holbrook v. Tobey, 66 Me. 410, 22 Am. Rep. 581; Lynde v. Thompson, 2 Allen, 456; Colby v. Bailey, 5 Hawaii, 152.

<sup>1</sup> Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. Rep. 398; Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. Rep. 609 (Ct. Ct. of Appeals, 8th Ct.), citing this and the preceding section.

<sup>2</sup> Allison v. Dunwoody, 100 Ga. 51, 28 S. E. Rep. 651; Poppers v. Meagher, 148 Ill. 192, 35 N. E. Rep. 805; Gates v. Parmly, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739; Edgar & Thompson Works v. United States, 34 Ct. of Cls. 205; Willson v. Love, [1896] 1 Q. B. 626; Houghton v. Pattee, 58 N. H. 326; Mathews v. Sharp, 99 Pa. 560; Colwell v. Lawrence, 38 N. Y. 75.

<sup>3</sup> Chicago House-Wrecking Co. v. United States, 45 C. C. A. 343, 106 Fed. Rep. 385 (disapproved in Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 660, 22 Sup. Ct. Rep. 240, as is Gay Manuf. Co. v. Camp, *infra*);

the erection of public works pursuant to statutes are to be regarded as penal because it cannot be supposed that it was the intention of the legislature to fix the damages in every case for each and every breach of the contracts the bonds were given to secure the performance of, regardless of the resulting injury.<sup>1</sup> The penalty of a druggist's bond given to assure his observance of the law is not to be considered as liquidated damages.<sup>2</sup> And so of bonds usually given to secure the performance of statutory duties,<sup>3</sup> and the bonds required of retail liquor dealers,<sup>4</sup> though a bond given under the liquor tax law of New York to secure on the part of the principal therein the observance of that law and also good behavior in other particulars essential to the orderly and proper conduct of his business, is for stipulated damages, and the liability of the surety thereon is not affected because a judgment has been rendered against the principal for a sum equal to the penalty of the bond.<sup>5</sup> The rule in Connecticut is to the same effect.<sup>6</sup>

It is apparent from this consideration of the cases that in determining whether the sum named in a contract is to be taken as a penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement, nor by the terms

Radloff v. Haase, 96 Ill. App. 74; Gay Manuf. Co. v. Camp, 13 C. C. A. 137, 65 Fed. Rep. 794; Lowman v. Foley, 14 N. Z. 699; Wheedon v. American Bonding & Trust Co., 128 N. C. 69, 38 S. E. Rep. 255; Seeman v. Biemann, 108 Wis. 365, 84 N. W. Rep. 490; Higbie v. Farr, 28 Minn. 439, 10 N. W. Rep. 592; Horner v. Flintoff, 9 M. & W. 678; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160; Lindsay v. Anesley, 6 Ired. 188; Baird v. Tolliver, 6 Humph. 186, 44 Am. Dec. 298; Yenner v. Hammond, 36 Wis. 277; Lapman v. Cochran, 16 N. Y. 275.

If the parties use the term "liquidated damages" the usual technical meaning will be given it if no reason appears for doing otherwise, and the party objecting to such construction has the burden of showing

that something else was really intended. Kelley v. Fejervary, 111 Iowa, 693, 83 N. W. Rep. 791.

<sup>1</sup> Nevada County v. Hicks, 38 Ark. 557; Pigeon v. United States, 27 Ct. of Cls. 167. But see the last paragraph of this section.

<sup>2</sup> State v. Estabrook, 29 Kan. 739.

<sup>3</sup> Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. Rep. 878; United States v. Montell, Taney, 47. See People v. Central Pacific R. Co., 76 Cal. 29, 18 Pac. Rep. 90.

<sup>4</sup> State v. Larson, 83 Minn. 124, 86 N. W. Rep. 3. See Jenkins v. Danville, 79 Ill. App. 339.

<sup>5</sup> Lyman v. Shenandoah Social Club, 39 App. Div. 459, 57 N. Y. Supp. 372.

<sup>6</sup> Quintard v. Corcoran, 50 Conn. 34.

used by the parties, nor even by their manifest intent. Where the sum named has been expressly designated as stipulated damages it has been held to be a penalty; and, conversely, where the sum has been denominated a penalty, it has been declared to be stipulated damages. And where the intent of the parties has been manifest it has been disregarded if the sum was an unconscionable one.<sup>1</sup> The better rule is that declared in a recent case decided by the supreme court of the United States, the doctrine of which puts agreements for the liquidation of damages upon substantially the same footing as other contracts in which fraud, surprise or mistake has not entered.<sup>2</sup>

A condition in an ordinance governing the rights and duties of a water company in its relations to the municipality may be sustained as providing for stipulated damages though it would be considered as providing for a penalty if it was part of a contract between individuals. It was said in a case involving this question: In granting the franchise to the water company the city was exercising a public and governmental function. It could impose such conditions and enforceable penalties as it deemed necessary and proper to secure the object sought to be attained. It had the right to provide what rates or rentals the company might charge for water, and when and under what circumstances it should have the right to charge them. The business in which the water company was about to engage was one affected with a public interest, and hence subject to regulation in the exercise of the police power of the state. In accepting the ordinance the water company accepted it with all its terms and conditions. Hence, we do not think the ordinary rules which apply to a contract between private parties with reference to business not affected with a public interest have any application in determining whether this provision is or is not a non-enforceable penalty. Even if

<sup>1</sup> Davis v. United States, 17 Ct. of Cls. 201; L. P. & J. A. Smith Co. v. United States, 34 id. 472; Sanford v. First Nat. Bank, 94 Iowa, 683, 63 N. W. Rep. 459; De Graff v. Wickham, 89 Iowa, 720, 52 N. W. Rep. 503, 57 id. 320; O'Keefe v. Dyer, 20 Mont. 477, 52 Pac Rep. 196; Gilli-

lan v. Rollins, 41 Neb. 540, 59 N. W. Rep. 893; Caesar v. Robinson, 71 App. Div. 180, 75 N. Y. Supp. 544; Dobbs v. Turner, 70 S. W. Rep. 458.

<sup>2</sup> Sun Printing & Pub. Co. v. Moore, 183 U. S. 642, 22 Sup. Ct. Rep. 240, stated and quoted from in § 283.

it is to be considered as a penalty we think it is enforceable, although the same provision, if contained in a private contract, might be non-enforceable. There is no reason why the city, in exercising a governmental function with reference to a business affected with a public interest, might not incorporate into the very ordinance granting the franchise an enforceable condition or penalty in the nature of a public regulation to insure performance of its public duty on part of the grantee of the franchise.<sup>1</sup>

**§ 285. Stipulated sum where damages otherwise certain or uncertain.** There is a marked difference between contracts which relate to subjects within established rules for measuring damages, and those for infraction of which the damages are uncertain and difficult to be proved. A stipulated sum in a contract of the former class is generally unnecessary unless to restrict damages below the legal standard or extend them beyond it. The parties have the right to do either; and when the intention is clearly manifested to do so, it will be enforced in cases clear of fraud, oppression or unconscionable extravagance.<sup>2</sup> But in such cases the disparity between the agreed sum and the actual injury is readily seen, and may be supposed

<sup>1</sup> *State Trust Co. v. Duluth*, 70 Minn. 257, 73 N. W. Rep. 249. See *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. Rep. 1093; *Brooks v. Wichita*, 114 Fed. Rep. 297, 52 C. C. A. 209; *Salem v. Anson*, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169; *Whiting v. New Baltimore*, 127 Mich. 66, 86 N. W. Rep. 403.

<sup>2</sup> *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 19 S. W. Rep. 1056; *Nielson v. Read*, 15 Phila. 450, 12 Fed. Rep. 441; *Gallo v. McAndrews*, 29 Fed. Rep. 715; *Lipscomb v. Seegers*, 19 S. C. 425; *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

In *Cutler v. How*, 8 Mass. 257, a party being liable to have his property taken to satisfy an execution, gave an obligation to pay the debt, and a certain amount for costs not incurred, in oats at twenty cents

per bushel, when they were worth thirty-seven cents. It was held that the jury might disregard the contract because unconscionable and oppressive as to the sum added for costs; but otherwise valid, because within a specified time the debtor had the option to pay money at the rate of \$1 for five bushels. *Cutler v. Johnson*, 8 Mass. 266; *Baxter v. Wales*, 13 id. 365; *Leland v. Stone*, 10 id. 459; *James v. Morgan*, 1 Levinz, 111; *Earl of Chesterfield v. Jansen*, 1 Wils. 287; *Russell v. Roberts*, 3 E. D. Smith, 318.

In an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, the jury might mitigate the damages. *Bac. Abr., Damages, D.* See *Thornborow v. Whitacre*, 2 Ld. Raym. 1164.

to have been equally apparent to the parties; and courts, proceeding upon the rational theory, which all experience confirms, that large damages for small injury are never willingly stipulated to be actually paid, nor a small and disproportionate compensation accepted for a great injury, are seldom convinced that such unequal contracts are voluntarily entered into to liquidate damages. Of this nature are contracts for the [492] payment of money, and all others for the violation of which market values furnish the *data* ordinarily adequate for the ascertainment of due compensation. When such contracts provide for damages, either more or less than those due by the legal standard, they must be drawn with great clearness to express the intention; and in general there should appear on their face or otherwise some ground for departing from that standard; for the leaning of the court in case of doubt will be towards the construction that the provision is a penalty.<sup>1</sup> On the other hand, where a contract is of such a character that the damages which must result from a breach of it are uncertain in their nature and not susceptible of proof by reference to any pecuniary standard, it is deemed especially fit that the parties should liquidate them, and any stipulation they make ostensibly for that purpose receives favorable consideration.<sup>2</sup>

<sup>1</sup> Williston v. Mathews, 55 Minn. Rep. 196; Squires v. Elwood, 33 422, 56 N. W. Rep. 1112; State Trust Co. v. Duluth, 70 Minn. 257, 73 N. W. Rep. 257; Lowman v. Foley, 14 N. Z. 699; Parlin v. Boatman, 84 Mo. App. 67; Seeman v. Beemann, 108 Wis. 365, 84 N. W. Rep. 490; Tilley v. American Building & Loan Ass'n, 52 Fed. Rep. 618; Lansing v. Dodd, 45 N. J. L. 525; Tinkham v. Satori, 44 Mo. App. 659; Fisk v. Gray, 11 Allen, 132; Baird v. Tolliver, 6 Humph. 186, 44 Am. Dec. 298; Foote v. Sprague, 13 Kan. 155; Tholen v. Duffy, 7 id. 405; Kurtz v. Sponable, 6 id. 395; Wilmington Transportation Co. v. O'Neil, 98 Cal. 1, 32 Pac. Rep. 705; Easton v. Cressey, 100 Cal. 75, 34 Pac. Rep. 622; Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. Rep. 130; North & South Rolling Stock Co. v. O'Hara, 73 Ill. App. 691; O'Keefe v. Dyer, 20 Mont. 477, 52 Pac. Rep. 126, 49 N. W. Rep. 939; McIntosh v. Johnson, 8 Utah, 359, 30 Pac. Rep. 1091; Maudlin v. American Savings & Loan Ass'n, 63 Minn. 258, 65 N. W. Rep. 645; Radloff v. Haase, 196 Ill. 365, 63 N. E. Rep. 729, and local cases cited; Nilson v. Jonesboro, 57 Ark. 168, 175, 20 S. W. Rep. 1093, citing the text; Johnson v. Cook, 24 Wash. 474, 64 Pac. Rep. 729, citing the preceding section; Home Land & Cattle Co. v. McNamara, 111 Fed. Rep. 822, 49 C. C. A. 642, applying the Montana code, and citing the text; Caesar v. Robinson, — N. Y. —, 67 N. E. Rep. 58.

<sup>2</sup> Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. Rep. 1058, 43 Am. St. 267; Heisen v. Westfall, 86 Ill. App. 576; Louisville

§ 286. **Contracts for the payment of money.** These are contracts of the highest degree of certainty. Interest is the universal measure of damages for mere delay of payment.<sup>1</sup> But some latitude is allowed for modifying the rate by contract. Stipulations as to rate before maturity, not exceeding any statutory limit, are uniformly enforced in cases free from fraud or oppression. There is no reason why a party may not stipulate the rate after maturity as freely and effectually as before, except that such stipulations are made with less caution, for they are made only to be operative in case of default, an event not then anticipated to occur. When, therefore, the rate is made very much higher immediately after maturity than that reserved before, there is a departure from the standard of compensation fixed by the parties for the period of credit, and it has been held in some cases that such increased rate [493] as damages is in the nature of a penalty;<sup>2</sup> and in other cases

Water Co. v. Youngstown Bridge Co., 16 Ky. L. Rep. 350; Woodbury v. Turner, etc. Manuf. Co., 96 Ky. 459, 29 S. W. Rep. 295; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132, 26 Atl. Rep. 140, 39 Am. St. 626; Goldman v. Goldman, 51 La. Ann. 761, 25 So. Rep. 555; Willson v. Baltimore, 83 Md. 203, 34 Atl. Rep. 774, 55 Am. St. 339; Mawson v. Leavitt, 16 N. Y. Misc. 289, 37 N. Y. Supp. 1138; Nilson v. Jonesboro, 57 Ark. 168, 20 S. W. Rep. 1093, citing the text; Waggoner v. Cox, 40 Ohio St. 539; Berrinkott v. Traphagen, 39 Wis. 219; Wooster v. Kisch, 26 Hun. 61; Jones v. Binford, 74 Me. 439; Geiger v. Western Maryland R. Co., 41 Md. 4; Pennsylvania R. Co. v. Reichert, 58 id. 261, 277; Wolf Creek Diamond Coal Co. v. Schultz, 71 Pa. 180; Kemble v. Farren, 6 Bing. 141; Sainter v. Ferguson, 7 C. B. 716; Fletcher v. Dyche, 2 T. R. 32; Sparrow v. Paris, 7 H. & N. 594; Mundy v. Culver, 18 Barb. 336; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Dakin v. Williams, 17 Wend. 447; Knapp v. Maltby, 13 Wend. 587;

Price v. Green, 16 M. & W. 346; Jaquith v. Hudson, 5 Mich. 123; Cotheal v. Talmage, 9 N. Y. 551; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160; Whiting v. New Baltimore, 127 Mich. 66, 86 N. W. Rep. 403, citing the text; Peach v. Jewish Congregation of Johannesburg, 1 So. African Rep. 345 (1894).

<sup>1</sup> Morrill v. Weeks, 70 N. H. 178, 46 Atl. Rep. 32; Orr v. Churchill, 1 H. Black. 227; Fisk v. Gray, 11 Allen, 132; Watkins v. Morgan, 6 C. & P. 661; Hughes v. Fisher, Walk. (Miss.) 516.

<sup>2</sup> Waller v. Long, 6 Munf. 71; Upton v. O'Donahue, 32 Neb. 565, 49 N. W. Rep. 267; Hallam v. Telleren, 55 Neb. 255, 75 N. W. Rep. 560.

In Astley v. Weldon, 2 B. & P. 346, Heath, J., said: "It is a well-known rule in equity that if a mortgage covenant be to pay 5% per cent., and if the interest be paid on certain days then to be reduced to 4% per cent., the court will not relieve if the early days be suffered to pass without payment; but if the covenant be to pay 4% per cent., and the party

that anything above the legal rate is a penalty, even though parties are by law at liberty to stipulate for any rate of interest proper without restriction.<sup>1</sup> But the general current of authority is that any rate which parties may lawfully agree to pay before maturity may be fixed as the rate afterwards, though the debt, before it becomes due, bears no interest or a lower rate.<sup>2</sup> If, however, a rate is fixed for interest as damages which is above the highest that may be reserved by agreement to be paid during the period of credit, it is not usurious, [494] because the debtor can at any time relieve himself by payment.<sup>3</sup> But such excessive rate will be held a penalty if it exceeds any which the law recognizes as compensation.<sup>4</sup> In Illinois even a rate above that allowed by law to be contracted for before maturity may be fixed as liquidated damages after maturity, if not intended as an evasion of the statute against

do not pay at a certain time it shall be raised to 5% per cent., there the court of chancery will relieve." See *Gully v. Remy*, 1 Blackf. 69; *Herbert v. Salisbury, etc. R. Co.*, L. R. 2 Eq. 221; *Aylet v. Dodd*, 2 Atk. 238; *Watts v. Watts*, 11 Mo. 547.

<sup>1</sup> *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Talcott v. Marston*, 3 Minn. 339; *Daniels v. Ward*, 4 id. 168; *Robinson v. Kinney*, 2 Kan. 184; *Watkins v. Morgan*, 6 C. & P. 661.

<sup>2</sup> *Palmer v. Leffler*, 18 Iowa, 125; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Fisher v. Bidwell*, 27 Conn. 363; *Downey v. Beach*, 78 Ill. 53; *Funk v. Buck*, 91 Ill. 575; *Wernwag v. Mothershead*, 3 Blackf. 401; *Latham v. Darling*, 2 Ill. 203; *Young v. Fluke*, 15 Up. Can. C. P. 360; *Witherow v. Briggs*, 67 Ill. 96; *Davis v. Rider*, 53 Ill. 416; *Brewster v. Wakefield*, 22 How. 118; *Wyman v. Cochrane*, 35 Ill. 152; *Gould v. Bishop Hill Colony*, 35 Ill. 334; *Lawrence v. Cowles*, 13 Ill. 577; *Smith v. Whitaker*, 23 Ill. 367; *Young v. Thompson*, 2 Kan. 83; *Dudley v. Reynolds*, 1 Kan. 285; *Wilkinson*

*v. Daniels*, 1 Greene, 179; *Taylor v. Meek*, 4 Blackf. 388. See ch. 8.

<sup>3</sup> *Lawrence v. Cowles*, 13 Ill. 577; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Witherow v. Briggs*, 67 Ill. 96; *Wildey v. Morrison*, 66 Ill. 532; *Cutler v. How*, 8 Mass. 257; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa, 432; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Moore v. Hylton*, 1 Dev. Eq. 433; *Campbell v. Shields*, 6 Leigh, 517; *Gambrell v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Fisher v. Otis*, 3 Pin. 78; *Shuck v. Wight*, 1 G. Greene, 128; *Wight v. Shuck, Morris*, 425; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Jones v. Berryhill*, 25 Iowa, 289; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349; *Roberts v. Tremayne*, *Croke's James*, 507; *Floyer v. Edwards*, 1 Cowp. 112; *Wells v. Girling*, 1 Brod. & Bing. 447; *Caton v. Shaw*, 2 H. & G. 13; *Bac. Abr.*, title *Usury*.

<sup>4</sup> *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Shuck v. Wight*, 1 G. Greene, 128; *Wilson v. Dean*, 10 Iowa, 432; *Wight v. Shuck, Morris*, 425.



usury.<sup>1</sup> No damages for the mere non-payment of money can be so liquidated between the parties as to evade that statute.<sup>2</sup> An agreement in a note and mortgage to pay an increased rate of interest in case of default in payment of any instalment of interest, insurance premium, taxes or the principal, is in the nature of a penalty, and will not be enforced in a foreclosure suit.<sup>3</sup>

Where there are special circumstances which require punctuality in the payment of moneys when due or which cause special loss, or necessitate a particular outlay in consequence of default, a stipulated forfeiture on that default equity has refused to relieve against, and stipulated compensations therefor have been sanctioned. Thus costs and expenses of making collection, including attorney's fees, are sometimes imposed on the debtor by the terms of the contract, and when reasonable in amount have been sustained as valid in some states,<sup>4</sup> but held void as against public policy in others.<sup>5</sup>

<sup>1</sup> *Smith v. Whitaker*, 23 Ill. 367; *Downey v. Beach*, 78 Ill. 53; *Funk v. Buck*, 91 Ill. 575.

<sup>2</sup> *Orr v. Churchill*, 1 H. Black. 227; *Gray v. Crosby*, 18 Johns. 219.

<sup>3</sup> *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. Rep. 415, 50 Am. St. 871.

<sup>4</sup> *Peyser v. Cole*, 11 Ore. 39, 50 Am. Rep. 451, 4 Pac. Rep. 520; *Imler v. Imler*, 94 Pa. 372; *Darby v. Maitland*, 88 id. 384, 32 Am. Rep. 457 (the amount provided as attorney's fee in a mortgage is rather in the nature of a penalty than stipulated damages, and may be reduced); *Miner v. Paris Exchange Bank*, 53 Tex. 559; *Parham v. Pulliam*, 5 Cold. 497; *Smith v. Silvers*, 32 Ind. 321; *First Nat. Bank v. Larsen*, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. Rep. 67 (the stipulation is not conclusive as to the amount to be recovered); *Robinson v. Loomis*, 51 Pa. 78; *Huling v. Drexell*, 7 Watts, 126; *Fitzsimons v. Baum*, 44 Pa. 32; *M'Allister's Appeal*, 59 Pa. 204; *Tallman v. Truesdell*, 3 Wis. 443; *Mosher v. Chapin*, 12 id. 453; *Billingsley v. Dean*, 11 Ind. 331; *Kuhn v. Myers*,

37 Iowa, 351; *Nelson v. Everett*, 29 id. 184; *Williams v. Meeker*, id. 292; *Wilson S. M. Co. v. Moreno*, 6 Sawyer, 35; *Bank of British North America v. Ellis*, id. 96; *Merck v. American Freehold L. M. Co.*, 79 Ga. 213, 233; *Reed v. Miller*, 1 Wash. 426. See § 564.

<sup>5</sup> *State v. Taylor*, 10 Ohio, 368; *Shelton v. Gill*, 11 id. 417; *Witherspoon v. Musselman*, 14 Bush, 214; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Dow v. Updike*, 11 Neb. 95, 7 N. W. Rep. 857. See § 564.

In *Foot v. Sprague*, 13 Kan. 155, a stipulation in a mortgage for \$50 as liquidated damages for its foreclosure was held void. *Valentine, J.*, said: "The stipulation in the mortgage in this case . . . is for a certain sum to be paid by the debtor as liquidated damages over and above the debt and interest and all legitimate costs. Now what was the term 'liquidated damages' in this mortgage designed to cover? If it was designed to cover attorney fees, why did not the parties say so in the mortgage? If it was designed to

[495] § 287. **Same subject.** Where there is a stipulation in public undertakings that shareholders, on non-payment of calls, shall forfeit their shares, equity, upon grounds of public policy and from the necessity of punctuality in payment in such cases, will refuse to interfere and grant relief from forfeiture.<sup>1</sup> Sir William Grant, M. R.,<sup>2</sup> refused to relieve against a forfeiture under a by-law of an incorporated company which provided that the members receiving notice of default in paying a call should incur a forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from the town where the notice was sent and other accidental circumstances. He said: "This bill is founded on forfeiture, and upon the ground that the plaintiff did not consider himself as a partner, and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose

cover any legitimate charge or expense, why did they not say so? . . . If the damages were for usurious interest they could not be allowed. And would it be proper to allow an issue to be framed and a trial had to determine whether these 'liquidated damages' were intended to cover some legitimate charge or expense, or to cover usurious interest?"

In *Johnsons v. Anderson*, 3 N. J. L. 983, the defendant was indebted to the plaintiff in the sum of \$500; and the plaintiff was indebted to two other persons in the sum of \$100, which would come due May 1, 1810. In consequence of plaintiff being in danger of suit and costs for these debts, the defendant promised that he would pay the debt due from him to the plaintiff to enable him to discharge in time these debts, and in case of failure to do so, and the plaintiff should be sued and put to costs and expenses, the defendant would pay them. The defendant failed to pay the money at the time, whereupon the plaintiff was sued in two actions and put to \$80 costs, for

recovery of which from the defendant this suit was brought. It was held that the plaintiff was not entitled to recover. The court say, "there is no legal consideration on which the promise can attach. If this was law, usury and oppression would take a wide range. The creditor in most cases suffers an inconvenience in the case of a want of punctuality in his debtor; he cannot, however, recover more than the debt, interest and costs; nor will a promise to pay more help his case."

A. being indebted to B. and not being able to raise the money himself directed B. to raise it and promised to pay him whatever he had to pay for it. B. raised it at an exorbitant interest for three years; held, that B. was the mere agent of A. in raising the loan and was entitled to recover the whole amount paid by B. for the use of the money. *Shirley v. Spencer*, 9 Ill. 583.

<sup>1</sup> 3 Lead. Cas. in Eq. 917.

<sup>2</sup> *Sparks v. Liverpool Water Works*, 13 Ves. 428.

terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in those undertakings, they could not be carried on. It is essential that the money should be paid, and that they should [496] know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in a majority of cases it is no compensation from the uncertainty in which they may be left. The effect is the same whether the money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can, in equity, enter into a discussion of the circumstances each may bring his suit. They must remain a considerable time to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted there cannot be any certainty that every member who has made default may not file a bill. Can the court impose a limitation of the period when bills may be filed? If the court ever began to deal with these cases the number must be infinite. This is the mode which a party has to withdraw from a losing concern. Why is not this equity open to contracts for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit? And if they could have their relief, how could the government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a bill. Accident here is only the want of precaution.”<sup>1</sup>

<sup>1</sup> See *Georgia Land and Cotton Co. v. Flint*, 35 Ga. 226; *Hughes v. Fisher*, Walk. (Miss.) 516; *Fowler v. Word*, Harp. 372.

Equity, says Mr. Cook in vol. 1 of his treatise on Corporations (3d ed.), § 134, will sometimes set aside a forfeiture on purely equitable grounds; as, for example, where a forfeiture was declared for non-payment of calls, which, it was shown, were not paid because the shareholder had died, and no administrator had been appointed before the time for payment had fully elapsed. *Glass v. Hope*, 16 Grant (Up. Can. Ch.) 420. Cf. *Walker v. Ogden*, 1 Biss. 287, 29 Fed. Cas. 41. . . . But it seems that the weight of authority is to the effect that a forfeiture of shares, lawful and regular, for non-payment of assessments, is one of those for-

A sum greater than interest may be fixed by the parties as compensation for paying a debt at an earlier time or at a different place.<sup>1</sup> It is obvious that the omission to pay money pursuant to agreement in particular situations, or for specific purposes which would otherwise miscarry, followed by loss or injury of uncertain amount, and for which interest would be no adequate compensation, may be the subject of a different measure of reparation by agreement, as it often is without such agreement.<sup>2</sup>

feitures from which equity will not afford relief except in very exceptional cases. *Sparks v. Liverpool Water Works*, 13 Ves. 428; *Prendergast v. Turner*, 1 Y. & C. 98; *Germantown, etc. R. v. Fitler*, 60 Pa. 124; *Clark v. Barnard*, 2 Sup. Ct. Rep. 878, 108 U. S. 436, 456. Equity will not relieve where, on the reorganization of a company, old stockholders fail to use their options for securing new shares before the expiration of a fixed time limit. *Vatable v. New York, etc. R. Co.*, 96 N. Y. 49, 57. Equity will not relieve from such forfeiture, because to do so would, it is said, be in contravention of the direct expression of the legislative will. *Small v. Herkimer Manuf. Co.*, 2 N. Y. 330, 340. Neither can a shareholder have a forfeiture set aside merely because the calls which he refused to pay were for the purpose of paying debts which the company would not have owed but for the previous misappropriation of the corporate funds by the trustees. *Marshall v. Golden Fleece, etc. Co.*, 16 Nev. 156, 179; *Weeks v. Silver Islet, etc. Co.*, 55 N. Y. Super. Ct. 1; *Taylor v. North Star, etc. Co.*, 79 Cal. 285, 21 Pac. Rep. 753.

<sup>1</sup> *Plummer v. McKean*, 2 Stew. 423; *Jordan v. Lewis*, id. 426; *Thompson v. Hudson*, L. R. 4 Eng. & Ir. App. 1, reversing L. R. 2 Eq. 612; *Lord Ash-town v. White*, 11 Irish L. 400. See *United States v. Gurney*, 4 Cranch, 333.

<sup>2</sup> *Woodbridge v. Bropley*, 2 West. L. Monthly, 274; *Hardee v. Howard*, 33 Ga. 533, 83 Am. Dec. 176; *Sutton v. Howard*, 33 Ga. 536. See § 76.

In *Parfitt v. Chambre*, L. R. 15 Eq. 36, an action at law was by consent referred, and the arbitrator awarded and ordered that the defendant should pay to the plaintiff in the action an annuity of £1,200 a year for life, and that in order to secure the annuity the defendant should, within two months, purchase and convey to trustees on behalf of the plaintiff a government annuity of £1,200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." No annuity as directed by the award having been purchased, the plaintiff having been adjudicated a bankrupt, the defendant having died, and the £1,200 a year and £100 a month having been regularly paid to the plaintiff

A contract between a borrower and a loan association that the gross amount of the stock dues without any rebate or discount for the time they had run might be recovered as liquidated damages in case of default in complying with the terms of the mortgage, is void, because the breach of the mortgage is merely the breach of a contract for the payment of money, the damages for which are easily ascertained.<sup>1</sup> Where there is a breach of a contract to deliver property in exchange or pay its agreed value, the obligation becomes one for the payment of money, and no question as between penalty and liquidated damages arises.<sup>2</sup>

The duty of a bank to pay the checks, drafts and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by any earlier lien in its favor, is but a legal obligation to pay money. It is implied from the usual course of business, if it is not express; and it usually is not.<sup>3</sup> The customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of the banking business.<sup>4</sup> This duty of the bank is of such importance that if it refuses without sufficient justification to pay the check of the customer, he has his action, and may recover substantial damages, though no actual loss or injury be shown, and may recover for such approximate loss or injury as may be proven.<sup>5</sup>

**§ 288. Large sum to secure payment of a smaller.** Where a large sum, which is not the actual debt, is agreed to be paid

and her assigns up to the defendant's death, but not since, upon claim by the assignees to prove against the defendant's estate for the payment due in respect of the annuity, and of the monthly payments accrued due since his death: Held, that the £100 per month, though called a penalty, was not to be regarded strictly as such, and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month."

<sup>1</sup> Maudlin v. American Savings &

Loan Ass'n, 63 Minn. 358, 65 N. W. Rep. 645.

<sup>2</sup> First Nat. Bank v. Lynch, 6 Tex. Civ. App. 590, 25 S. W. Rep. 1042.

<sup>3</sup> Downes v. Phoenix Bank, 6 Hill, 297; Marzetti v. Williams, 1 B. & Ad. 415; Watson v. Phoenix Bank, 8 Met. 217, 41 Am. Dec. 500; Morse on Banking, 29.

<sup>4</sup> Id.: Munn v. Burch, 25 Ill. 35; Chicago, etc. Ins. Co. v. Stanford, 28 Ill. 168, 81 Am. Dec. 270.

<sup>5</sup> Rollin v. Steward, 14 C. B. 595; Morse on Banking, 453; § 77.

[498] in case of a default in the payment of a less sum, which is the real debt, such larger sum is always a penalty.<sup>1</sup> This rule has often been loosely stated, and its true scope and operation overlooked by following too rigidly the letter. A contract may be framed so as apparently to secure the payment of a less sum by a greater, when it is in substance but an alternative or conditional agreement to accept a stipulated part in full satisfaction if paid at a particular time or in a specified manner.<sup>2</sup> A demise of land was made at a yearly rent of

<sup>1</sup>*Cimarron Land Co. v. Barton*, 51 Kan. 554, 33 Pac. Rep. 317; *Schmieder v. Kingsley*, 6 N. Y. Misc. 107, 26 N. Y. Supp. 31; *Goodyear Shoe Machinery Co. v. Selz*, 157 Ill. 186, 41 N. E. Rep. 625; *Kimball v. Doggett*, 62 Ill. App. 528; *Turrell v. Archer*, 1 Mart. Ch. 103; *Fisk v. Gray*, 11 Allen, 132; *Walsh v. Curtis*, 73 Minn. 254, 76 N. W. Rep. 52; *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. Rep. 415, 50 Am. St. 871; *Bradstreet v. Baker*, 14 R. I. 546; *Bryton v. Marston*, 33 Ill. App. 211; *Clements v. Railroad Co.*, 132 Pa. 445, 19 Atl. Rep. 274, 276; *Astley v. Weldon*, 2 B. & P. 346; *Taul v. Everet*, 4 J. J. Marsh. 10; *Bagley v. Peddie*, 5 Sandf. 192; *Beale v. Hayes*, id. 640; *Cairnes v. Knight*, 17 Ohio St. 69; *Morris v. McCoy*, 7 Nev. 399; *Tiernan v. Hinman*, 16 Ill. 400; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Haldeman v. Jennings*, 14 Ark. 329; *Mead v. Wheeler*, 13 N. H. 353; *Chamberlain v. Bagley*, 11 id. 234; *Kemble v. Farren*, 6 Bing. 141; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Niver v. Rossman*, 18 Barb. 50; *Kuhn v. Myers*, 37 Iowa, 351; *Davis v. Hendrie*, 1 Mont. 499; *Wallis v. Carpenter*, 13 Allen, 19; *Gray v. Crosby*, 18 Johns. 219; *Brockway v. Clark*, 6 Ohio, 45; *Brevard v. Wimberly*, 89 Mo. App. 331; *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. Rep. 32.

<sup>2</sup>In *Thompson v. Hudson*, L. R. 2 Eq. 612, a creditor had agreed with his debtor to remit part of his debt upon having a mortgage to secure

the payment of the balance in two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time. The debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt be not paid within two years, the whole of the original should be recovered; and it was held that the proviso was of the nature of a penalty from which the mortgagor was entitled to be relieved in equity; that the mortgagee could only recover the smaller sum. But on appeal to the house of lords (L. R. 4 Eng. & Ir. App. 1), this decision was reversed; and it was held if the larger sum is actually due, and the creditor agrees to take a lesser sum, provided that sum is secured in a certain way and paid on a certain day, and that, if these stipulations be not performed, he shall be entitled to recover the whole of the original debt, such remitter to such original debt does not constitute a penalty, and a court of equity will not relieve against it. *Mayne on Dam.* 101. Lord Westbury said that any plain man walking the streets of London would have said that it was in accordance with common sense; and if he were told that it would be requisite to go to three tribunals before getting it accepted, would have held up his hands with astonishment at the state of the law. *Carter v. Corley*, 23 Ala. 612.

£187, with the usual clauses for distress and entry on non-payment, and an agreement that so long as the lessee performed the covenant the lessor would be content with the yearly rent of £93, payable on the same day as the first reserved [499] rent. It was held that the larger rent was not penal; that ejectment could be maintained on its non-payment.<sup>1</sup>

Such cases must be determined on the true intent of the transaction. If the larger sum is in truth the actual price or debt, and the smaller only agreed upon as a satisfaction if paid under stated conditions, the omission to comply with the terms of payment in the easier mode will preserve to the creditor the right to exact the larger sum.<sup>2</sup> A case in Wisconsin was correctly decided on this principle. A bond was made in a penalty of \$900, conditioned that if the obligor should pay to the obligee one year after the death of her husband, and annually thereafter during her natural life, the sum of the interest on \$464 at the rate of seven per cent. per annum, the bond should be void, otherwise of force; and it was also provided in the condition that should any default be made in the payment of the said interest or any part thereof on any day wherein the same was made payable by the bond, and the same should remain unpaid and in arrear for thirty days, then and in that case the principal sum of \$464, with arrearages of interest thereon, should, at the option of the obligee, become immediately payable; and that if the payment of said interest were promptly made, then at the obligee's death the debt and the mortgage given to secure the bond should cease and be null. A default occurred in the payment of the annuities of interest; and the obligee gave notice of her option to consider the principal, with the arrears of interest, presently due and payable. The question was what sum was due on the bond which the mortgage in suit was given to secure. A decree had been made adopting the sum of \$464, mentioned in the condition as the principal that became due on its breach, and for that sum, with the delinquent interest, judgment was rendered. The defendant contended that the sum the plaintiff was entitled to recover was not \$464, but only the value of a life annuity of

<sup>1</sup> Lord Ashtown v. White, 11 Irish L. 400; McNitt v. Clark, 7 Johns. 465.    <sup>2</sup> Waggoner v. Cox, 4 Ohio St. 539, 543, quoting the text.

\$32.48 at the time the plaintiff declared her option; at which time she was fifty-two or fifty-three years of age. Such value, computed by the Northampton tables, was then a little less than \$300. Lyon, J., said: "The covenant was voluntarily [500] made by the obligor, and, so far as appears, he received therefor full value for the sum which he agreed to pay at the option of the obligee in case of default. The most that can be said against the justice of it is that the damages would be the same if default were made and the option declared at a much later period in the life of the obligee. But that is a contingency which it may be fairly presumed the obligor took into consideration when he made his covenant; and it was always in his power to prevent the happening of such contingency by paying the annuity which he covenanted to pay." The judge added: "It follows that the sum named in the bond is to be regarded as stipulated damages unless the gross value of the life annuity can be ascertained by some exact pecuniary standard." He discusses this question and arrives at the conclusion that the value is uncertain. It may be observed that that method of determining whether the sum mentioned in the condition was penalty or not would be very proper if it be assumed that the annuity was the primary object of the arrangement, and that no sum was originally fixed which represented the value of the defendant's undertaking, or of the consideration received; and that the gross sum was stipulated as the valuation put by the parties on the annuity; and equally so if the case was that \$464 was a sum arising in the transaction which they agreed might be withheld so long as the interest on it was promptly paid, and with the further benefit that the debt should cease at the creditor's death, otherwise to be paid at once; then the case stands on the principle of *Thompson v. Hudson*,<sup>1</sup> and the conditional method of discharge not having been strictly followed, the dispensation depending on it failed, and the original debt remained unsatisfied and absolute.<sup>2</sup>

<sup>1</sup> L. R. 2 Eq. 612, stated *supra*.

<sup>2</sup> *Berrinkott v. Traphagen*, 39 Wis. 219.

*Longworth v. Askren*, 15 Ohio St. 370, does not appear to be consistent with these views. An action was

brought to foreclose a mortgage made to secure a payment of this note: "For value received, I promise to pay N. L., or order, one thousand dollars, with interest yearly till paid, and payable as follows: In two,



Where a large sum is stipulated to be paid on the non- [501] payment of a less amount made payable by the same instrument, the former is *prima facie* a penalty. If the question is to be determined by construction of the instrument alone it

three, four, five, six, seven, eight, nine and ten years, equal instalments, with interest yearly, as aforesaid, *being the contract price of a lot*. But if each and every payment is made punctually as due, or before due, or within ten days after each is due, as an inducement to punctuality, two hundred dollars of the amount will be released. And eight hundred dollars and its yearly interest accepted in full payment, but not otherwise." Before the ten years expired full \$800 and annual interest on that sum had been paid; but the payments had not been made according to the terms of the contract as to time and amount. The court held that the sum of \$1,000 was penalty, and \$800 the actual debt according to the face of the note. White, J., said: "This case presents the single legal question: whether, upon the true construction of the mortgage note sued on, the one thousand dollars therein mentioned is to be regarded as a penalty. If that be its character, the judgment of the superior court should be affirmed; otherwise, it should be reversed. This is not the case of an agreement for the composition of a subsisting, independent indebtedness. The instrument in question creates the only debt on which the plaintiff relies for a recovery. Nor can the claim made by the plaintiff's counsel be supported, that the stipulation for the discharge of the obligation by the punctual payment of \$800 in instalments is a privilege given to the payer, and inserted for his exclusive benefit. This claim is based on the assumption that the \$1,000 was the sole consideration for the lot, and consequently is the amount of the

actual debt. But it is as fair to presume that the omission of the stipulation in regard to the \$800 would have defeated the sale as that the insertion of the \$1,000 secured it. The transaction was the sale of the lot; and the instrument in question contains the terms upon which it was made. All the stipulations on the part of the Ricords are supported by the same identical consideration. It is not to be presumed that the sale would have been concluded had any of the terms actually agreed to been omitted; and, as the terms of the sale were satisfactory to the parties, the presumption is they were acquiesced in, not as a special favor to either, but for the mutual benefit of both. Nor, in our view, does the order in which the sums are stated change their character, or the legal effect of the instrument; for whether the amount to be paid is to be reduced upon compliance with the terms of payment, or to be increased as a default, is only a different mode of expressing the same thing.

"All that the plaintiff, at the time of making the contract, had a right to expect was the payment of \$800, with the interest, in the instalments and at the times stipulated. These payments Ricords had promised to make punctually. A default occurred; and in such a contract, in our opinion, interest is to be regarded as a compensation for the injury caused by the delay. All beyond must be regarded either as penalty or liquidated damages; but under neither form can the plaintiff be allowed to recover more than what the law deems adequate compensation for the breach.

would be deemed a penalty. May the real transaction be investigated and, upon proper facts, a different interpretation and effect be given to the agreement? No language of the contract can be adopted which will shelter a penalty so that [502] inquiry may not be made into the subject-matter and surroundings to ascertain if it be such. The principle is often declared in terms that permits inquiry to go to the intrinsic nature of the transaction; and a large sum promised as a consequence of the non-payment of a small one will be held a penalty whatever may be the language describing it.<sup>1</sup> Wright, C. J., said in an Iowa case: "From all, however, we may deduce one point as settled. Whether the sum mentioned shall be considered as a penalty or as liquidated damages is a question of construction, on which the court may be aided by circumstances existing extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances may be inquired into, although

"It is to be noted that the only evidence of the terms of the sale is what appears from the instrument itself. There is nothing to show that the contract for the purchase of the lot was originally made, in fact, at \$1,000; and that the remission of the contract price to \$800 was the gratuitous act of the vendor. If the abatement stood on this footing, it would devolve on the party seeking its benefit to show that he had complied with the conditions upon which it was offered."

This opinion bases the right of the debtor to discharge the bond by payment of \$800 on its being reserved in the agreement of purchase; it, however, concedes that it was equally a part of the contract of sale that \$1,000 should be paid if all the instalments should not be punctually paid. It would seem to be a reciprocal right to enforce the bond according to its terms; that there was as ample a consideration for the agreement in either alternative as in the cases of

Lord Ashtown v. White, *supra*, and McNitt v. Clark, 7 Johns. 465.

Longworth v. Askren, *supra*, is approved in Goodyear Shoe Machinery Co. v. Selz, 158 Ill. 186, 41 N. E. Rep. 625. In the latter case a contract for the monthly rental of certain patented machines, to be computed on the month's manufacture of goods with the machines, stipulated that the rental should be due on the first day of the month next following, and to be paid within one month from that day, and that if the rents due on the first day of any month shall be paid on or before the fifteenth day thereof the lessor will grant a discount of fifty per cent. It was resolved that the sum to be computed, less the discount, was the actual debt, and that the so-called discount was a penalty.

<sup>1</sup> Bryton v. Marston, 33 Ill. App. 211; Bagley v. Peddie, 5 Sandf. 192; Niver v. Rossman, 18 Barb. 55; Morris v. McCoy, 7 Nev. 399.

the words are to be taken as proved exclusively by the writing."<sup>1</sup>

**§ 289. Stipulations where damages certain and easily proved.** On general principles, an agreement to pay a [503] fixed sum as damages for non-performance of a contract, where the loss or injury might without it be easily determined by proof of market values, or by a precise pecuniary standard, is subject to nearly the same criticism as a contract to liquidate damages for non-payment of money. There are no peculiar reasons why a stipulated sum should be treated as a penalty for exceeding just compensation for a default in the payment of money, and not be so treated in case of a different agreement where the excess is capable of being made equally manifest.<sup>2</sup> In money contracts any rate of interest not prohibited by statute may be contracted to be paid as interest proper;

<sup>1</sup> *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158; *Hodges v. King*, 7 Met. 583; *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160.

In *Morris v. McCoy*, 7 Nev. 399, *Lewis, C. J.*, said: "Although, as a general rule, it is acknowledged that the intention of the parties as expressed in the contract should be enforced, still, it is clearly ignored in that class of cases where the parties stipulate for the payment of a large sum of money as damages for the non-payment of a smaller sum at a given day. In such cases, it is said, no matter what may be the language of the parties, the large sum will be deemed a penalty, and not liquidated damages." But upon an exception to the exclusion of parol testimony to affect the question where the agreement was apparently of this nature, and such extrinsic evidence was offered to rebut the inference that the larger sum was a penalty, the learned judge said "that was not admissible, because there was no ambiguity; and it must be supposed that the agreement was fully em-

bodied in the written instrument. 1 Greenl. Ev., § 275."

<sup>2</sup> *Fisher v. Bidwell*, 27 Conn. 363.

Sec. 1670 of the Civil Code of California provides that "every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided" in sec. 1671, which says: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It has been ruled under these provisions that a stipulation by a building contractor to pay the owner a specified sum for each day's delay in completing the building is not of itself sufficient to authorize a recovery. *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890; *Long Beach City School District v. Dodge*, 135 Cal. 401, 67 Pac. Rep. 499.

There is no difficulty in fixing the actual damage which one sustains

that is, during the period of credit; so any sum may be contracted to be paid for property or services in a contract of purchase or hiring. But when parties contract for the same thing in advance as damages for a considerable excess above the customary rate of interest, or the market value of property or other thing, the agreement will raise the inquiry whether such excessive sum was intended to be paid; or whether, even if it was, it is not a penalty. It would be such, according to the preponderance of authority, if not intended to be paid in case of default, and if not fixed on the basis of compensation.<sup>1</sup> In such cases courts generally arrive at harmonious conclusions by diverse modes of reasoning. One will say the sum fixed is so flagrantly excessive it was evidently not the intention of the parties that it should be paid or enforced, and therefore it is a penalty. Another will say the excess, *per se*, makes the stated sum a penalty, and the intention of the parties is simply immaterial. It generally occurs that where there is an agreement to pay a gross sum in the [504] event of the non-performance of a contract, and the case is such that a jury can ascertain with reasonable certainty how much damages the injured party has actually sustained by the non-performance, courts are strongly inclined to regard the gross sum as a penalty, and not as liquidated damages.<sup>2</sup> If

by being deprived of the use of land to which he is entitled. *Eva v. McMahon*, 77 Cal. 467, 19 Pac. Rep. 872. Nor in ascertaining the damage resulting from the breach of a warranty of the fitness of a harvesting machine. *Greenleaf v. Stockton Combined Harvester & A. Works*, 78 Cal. 606, 21 Pac. Rep. 369.

<sup>1</sup> See *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

<sup>2</sup> *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. Rep. 1080; *Smith v. Newell*, 37 Fla. 147, 20 So. Rep. 249; *Simon v. Lanis*, 9 Ky. L. Rep. 59; *Hill v. Wertheimer-Swarts Shoe Co.*, 150 Mo. 483, 51 S. W. Rep. 702; *Connelly v. Priest*, 72 Mo. App. 673; *Knox Rock Blasting Co. v. Grafton Stone*

*Co.*, 16 Ohio Ct. Ct. 21, 64 Ohio St. 361, 60 N. E. Rep. 563; *Seim v. Krause*, 13 S. D. 530, 83 N. W. Rep. 583; *Schroeder v. California Yukon Trading Co.*, 95 Fed. Rep. 296; *Wilmington Transportation Co. v. O'Neil*, 98 Cal. 1, 32 Pac. Rep. 705; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. Rep. 774, 55 Am. St. 339; *Chaudé v. Shepard*, 122 N. Y. 397, 25 N. E. Rep. 358; *March v. Allabough*, 103 Pa. 335; *Brennan v. Clark*, 45 N. W. Rep. 472, 29 Neb. 385; *Lansing v. Dodd*, 45 N. J. L. 525; *Bradstreet v. Baker*, 14 R. I. 546; *Davis v. United States*, 17 Ct. of Cls. 201; *Spear v. Smith*, 1 Denio, 464; *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Streeter v. Rush*, 25 Cal. 67; *Bright v. Rowland*, 3 How. (Miss.) 398; *Scot-*

the intention, however, is clear to liquidate damages, and the amount is either not greatly above or below the sum which would otherwise be recoverable; or, if above, was fixed specially to cover contemplated consequential losses, not provable under legal rules, and is not an unreasonable provision therefore, the sum fixed may be sustained as liquidated damages.<sup>1</sup> But if the intention be doubtful, or the amount materially varies from a just estimate of compensation, the stated sum will be considered a penalty.<sup>2</sup>

*field v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *In re Newman*, 4 Ch. Div. 724; *Mansur & T. Implement Co. v. Tissier Arms & H. Co.*, — Ala. —. 33 So. Rep. 818.

In *Spender v. Tilden*, 5 Cow. 144, the defendant had agreed in writing not under seal, for value received, to pay \$360, or twelve cows and calves, to be paid or delivered at a place mentioned, in four years. It was held that the value of the consideration, and of the cows and calves, might be inquired into to see whether the sum expressed was intended by the parties as penalty or liquidated damages; and it appearing that that sum was much beyond the value of either, it was considered in the nature of a penalty, and the plaintiff's recovery was confined to the value of the cows and calves. See note at end of the case.

<sup>1</sup> *May v. Crawford*, 150 Mo. 504, 51 S. W. Rep. 693; *Henderson v. Murphree*, 109 Ala. 556, 20 So. Rep. 45; *Burk v. Dunn*, 55 Ill. App. 25; *Bird v. St. John's Episcopal Church*, 154 Ind. 138; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. Rep. 527; *Nielson v. Read*, 12 Fed. Rep. 441; *Gallo v. McAndrews*, 29 id. 715; *Brooks v. Wichita*, 114 id. 297, 52 C. C. A. 209; *Hodges v. King*, 7 Met. 583; *Manice v. Brady*, 15 Abb. Pr. 173; *Durst v. Swift*, 11 Tex. 273; *Walker v. Engler*, 30 Mo. 130; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Fitzpat-*

*rick v. Cottingham*, 14 Wis. 219; *Easton v. Pennsylvania & O. C. Co.*, 13 Ohio, 80; *Tardeveau v. Smith's Ex'r*, Hardin, 175, 3 Am. Dec. 727; *Bradshaw v. Craycraft*, 3 J. J. Marsh. 79; *Hodges*, Ex parte, 24 Ark. 197; *Talcott v. Marston*, 3 Minn. 339; *Shreve v. Brereton*, 51 Pa. 175; *Knapp v. Maltby*, 13 Wend. 587; *Powell v. Burroughs*, 54 Pa. 329; *Johnston v. Cowan*, 59 id. 275; *Keeble v. Keeble*, 85 Ala. 552; *Salem v. Anson*, 40 Ore. 339, 67 Pac. Rep. 190, 56 L. R. A. 169; *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. Rep. 1093; *Indianola v. Gulf, etc. R. Co.*, 59 Tex. 594.

<sup>2</sup> *Chicago House-Wrecking Co. v. United States*, 45 C. C. A. 343, 106 Fed. Rep. 385 (disapproved in *Sun Printing & Pub. Ass'n v. Moore*, *supra*); *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Lindsay v. Anesley*, 6 Ired. 188; *Mills v. Fox*, 4 E. D. Smith, 220; *Esmond v. Van Benschoten*, 12 Barb. 366; *Baird v. Tolliver*, 6 Humph. 186, 44 Am. Dec. 298.

The Alabama court looks with more favor upon contracts to stipulate damages than do most courts. It does not apply an exceptional rule of construction to them, nor protect one of the parties from the consequences of his error of judgment or improvidence at the expense of the other who may be, and in the case of any other contract would be, entitled to the rights given

§ 290. **Stipulation when damages uncertain.** If a contract does not afford any *data* from which actual damages can be calculated this circumstance has been held to afford a reason for regarding a sum designated in it as liquidated damages.<sup>1</sup> [505] This test would include among those deemed uncertain all contracts which require any extrinsic evidence to ascertain the extent of the actual injury. Expressions may be found in some cases favoring this criterion of uncertain damages.<sup>2</sup> But where the damages cannot be calculated by market values, nor by any precise pecuniary standard, or where, from the peculiar circumstances which the contract contemplates, there must be other uncertainty affecting the practical ascertainment of the amount of the actual loss, the law favors any fair adjustment of it by stipulation.<sup>3</sup> The damages resulting from breach of a

him under it. "Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation." *Keeble v. Keeble*, 85 Ala. 552, 5 So. Rep. 149, quoted with approval in *Henderson v. Murphree*, 109 Ala. 556, 20 So. Rep. 45. This is in harmony with *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

<sup>1</sup> *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. Rep. 1093; *Garst v. Harris*, 177 Mass. 72, 58 N. E. Rep. 174; *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. Rep. 892; *Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank*, 158 Mo. 272, 59 S. W. Rep. 109; *Coal Creek, etc. Co. v. Tennessee Coal, etc. Co.*, 106 Tenn. 651, 63 S. W. Rep. 162; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. Rep. 467; *Barry v. Harris*, 49 Vt. 392; *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. Rep. 243; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345; *Fletcher v. Dyche*, 2 T. R. 34; *Waggoner v. Cox*, 40 Ohio St. 539; *Wolf v. Des Moines R. Co.*, 64

Iowa, 380, 20 N. W. Rep. 481; *Ward v. Hudson River B. Co.*, 125 N. Y. 230, 26 N. E. Rep. 256; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652, 28 N. E. Rep. 469, 24 Am. St. 475; *De Graff v. Wickham*, 89 Iowa, 720, 52 N. W. Rep. 503; *Talkin v. Anderson*, 19 S. W. Rep. 852 (Texas Sup. Ct.).

<sup>2</sup> *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Streeter v. Rush*, 25 Cal. 67; *Esmond v. Van Benschoten*, 12 Barb. 366; *Craig v. Dillon*, 6 Up. Can. App. 116.

<sup>3</sup> *New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 333, 50 Atl. Rep. 881; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. Rep. 140; *Tennessee Manuf. Co. v. James*, 91 Tenn. 154, 15 L. R. A. 211, 18 S. W. Rep. 262; *Commonwealth v. Ginn & Co.*, 23 Ky. L. Rep. 521, 63 S. W. Rep. 467; *Kilbourne v. Burt & Brabb Lumber Co.*, 23 Ky. L. Rep. 985, 64 S. W. Rep. 631; *Whiting v. New Baltimore*, 127 Mich. 66, 86 N. W. Rep. 403; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. Rep. 760; *Keeble v. Keeble*, 85 Ala. 552, 5 So. Rep. 149; *St. Louis, etc. R. Co. v. Jefferson Stone Co.*, 90 Mo. App. 171; *Emery v. Boyle*, 200 Pa. 249, 49 Atl. Rep. 779; *Jennings*

marriage promise;<sup>1</sup> of an agreement not to engage in a particular occupation or business;<sup>2</sup> from delay in completing particular works, or in doing some other act on which ulterior transactions depend;<sup>3</sup> or damages from the disclosure of the

v. McCormick, 25 Wash. 427, 67 Pac. Rep. 764; Reichenbach v. Sage, 13 Wash. 364, 43 Pac. Rep. 354 52 Am. St. 51; Menges v. Milton Piano Co., — Mo. App. —, 70 S. W. Rep. 250; American Copper, Brass & Iron Works v. Galland-Burke Brewing & M. Co., — Wash. —, 70 Pac. Rep. 236; Wooster v. Kisch, 26 Hun, 61; Kemp v. Knickerbocker Ice Co., 69 N. Y. 45; Indianola v. Gulf, etc. R. Co., 56 Tex. 594; Jones v. Binford, 74 Me. 439; Lipscomb v. Seegers, 19 S. C. 425; 1 Dane's Abr. 549, § 18; Gammon v. Howe, 14 Me. 250; Tingley v. Cutler, 7 Conn. 291; Cotheal v. Talmage, 9 N. Y. 551; Bagley v. Peddie, *supra*; Mundy v. Culver, 18 Barb. 336; Wolf Diamond Coal Co. v. Schultz, 71 Pa. 180; Bingham v. Richardson, 1 Winston, 217; De Groff v. American L. T. Co., 24 Barb. 375; Fisk v. Fowler, 10 Cal. 512. In this case an ordinary bond with condition for delivery of title to a boat within a specified time was held to liquidate the damages at the sum stated as a penalty. See § 289.

<sup>1</sup> Lowe v. Peers, 4 Burr. 2225. See Abrams v. Kounts, 4 Ohio, 214.

<sup>2</sup> McCurry v. Gibson, 108 Ala. 451, 18 So. Rep. 806, 54 Am. St. 177; Boyce v. Watson, 52 Ill. App. 361; Stover v. Spielman, 1 Pa. Super. Ct. 526; Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. Rep. 706; Borley v. McDonald, 69 Vt. 309, 38 Atl. Rep. 60; Snider v. McKelvey, 27 Ont. App. 339; Palmer v. Toms, 96 Wis. 367, 71 N. W. Rep. 654; Newman v. Wolfson, 69 Ga. 764; Mueller v. Kline, 27 Ill. App. 473; Stevens v. Pillsbury, 57 Vt. 205; Tode v. Gross, 127 N. Y. 480, 24 Am. St. 475, 28 N. E. Rep. 469, 13 L. R. A. 652; Grasselli v. Lowden, 11

Ohio St. 349; Applegate v. Jacoby, 9 Dana, 206; Mott v. Mott, 11 Barb. 127; Rawlinson v. Clarke, 14 M. & W. 187; Hitchcock v. Coker, 6 Ad. & El. 438; Galesworthy v. Strutt, 1 Ex. 659; Green v. Price, 13 M. & W. 695; Dakin v. Williams, 17 Wend. 447; Williams v. Dakin, 23 id. 210; Lange v. Werk, 2 Ohio St. 519; Cushing v. Drew, 97 Mass. 445; Atkyns v. Kinnier, 4 Ex. 776; Mercer v. Irving, 1 E. B. & E. 563; Reynolds v. Bridge, 6 E. & B. 528; Nobles v. Bates, 7 Cow. 307; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; California Steam Nav. Co. v. Wright, 6 Cal. 258; DeGroff v. American L. T. Co., 24 Barb. 375; Stewart v. Bedell, 79 Pa. 336; Horner v. Flintoff, 9 M. & W. 678; Lightner v. Menzel, 35 Cal. 452; Sainter v. Ferguson, 7 C. B. 716; Davis v. Penton, 6 B. & C. 216; Bigony v. Tyson, 75 Pa. 157; Holbrook v. Tobey, 66 Me. 410, 22 Am. Rep. 581; Reilly v. Jones, 1 Bing. 302; Leighton v. Wales, 3 M. & W. 545; Crisdee v. Bolton, 3 C. & P. 240.

<sup>3</sup> Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. Rep. 609 (Ct. Ct. of Appeals, 8th Ct.); Ward v. Hudson River B. Co., 125 N. Y. 230, 26 N. E. Rep. 256; O'Brien v. Anniston Pipe-works, 93 Ala. 582, 9 So. Rep. 415; Law v. Local Board of Redditch, [1892] 1 Q. B. 127; De Graff v. Wickham, 89 Iowa, 720, 52 N. W. Rep. 503; Hall v. Crowley, 5 Allen, 304, 81 Am. Dec. 745; Curtis v. Brewer, 17 Pick. 513; Fletcher v. Dyche, 2 T. R. 32; Hamilton v. Moore, 33 Up. Can. Q. B. 100 and 520; Gaskin v. Wales, 9 Up. Can. C. P. 314; McPhee v. Wilson, 25 Up. Can. Q. B. 169; Bergheim v. Blaenavon Iron & S. Co., L. R. 10 Q. B. 319; Folsom v. McDonough, 6

[506] secrets of business,<sup>1</sup> or from breach of an agreement to abate a nuisance,<sup>2</sup> are manifestly of that nature; and stipulations fixing the damages for the total loss of a bargain for the purchase or leasing of lands and real estate,<sup>3</sup> or personal property,<sup>4</sup> have also been frequently sustained. An agreement by an employer to pay an employee a stated sum per year, or in a lump, if the former's business should be discontinued within a specified time, is for stipulated damages.<sup>5</sup>

There is more or less uncertainty in everything which depends upon the opinions or memories of witnesses; it may be increased, in the sense of furnishing a motive for stipulating damages, if the testimony under the circumstances contemplated by the contract would be at a great distance;<sup>6</sup> or must come solely from the defendant.<sup>7</sup> In a contract for the purchase of several city lots from one having still a large number to sell, the purchaser, in consideration of having the property conveyed to him for \$21,000, covenanted that he would by a certain day erect on the lots so conveyed two brick houses of specified dimensions, or, in default thereof, would pay on demand to the seller the sum of \$4,000. This sum was held to be liquidated damages. Whether the vendors would be better off if they got the money than they would have been had the

Cush. 208; *Harmony v. Bingham*, 12 N. Y. 100; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Weeks v. Little*, 47 N. Y. Super. Ct. 1; *Worrell v. McClinagan*, 5 Strob. 115; *Young v. White*, 5 Watts, 460; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) 59; *Pettis v. Bloomer*, 21 How. Pr. 317; *Crux v. Aldred*, 14 Week. Rep. 656; *Legge v. Harlock*, 12 Q. B. 1015. But see *Wilcus v. Kling*, 87 Ill. 107.

<sup>1</sup> *Nessle v. Reese*, 29 How. Pr. 382; *Reindel v. Schell*, 4 C. B. (N. S.) 97; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713.

<sup>2</sup> *Grasselli v. Lowden*, 11 Ohio St. 349; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. Rep. 760.

<sup>3</sup> *Leggett v. Mutual L. Ins. Co.*, 50 Barb. 616, 53 N. Y. 394; *Heard v. Bowers*, 23 Pick. 455; *Tingley v. Cut-*

*ler*, 7 Conn. 291; *Knapp v. Maltby*, 13 Wend. 587; *Slosson v. Beadle*, 7 Johns. 72; *Lynde v. Thompson*, 2 Allen, 456; *Lampman v. Cochran*, 19 Barb. 388, 16 N. Y. 275; *Mundy v. Culver*, 18 Barb. 336; *Clement v. Cash*, 21 N. Y. 253; *Hasbrouck v. Tappen*, 15 Johns. 200; *Harris v. Miller*, 6 Sawy. 319.

<sup>4</sup> *Peirce v. Jung*, 10 Wis. 30; *Allen v. Brazier*, 2 Bailey, 55; *Main v. King*, 10 Barb. 59; *Knowlton v. Mackay*, 29 Up. Can. C. P. 601; *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

<sup>5</sup> *Glynn v. Moran*, 174 Mass. 233, 54 N. E. Rep. 535.

<sup>6</sup> *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716.

<sup>7</sup> *Bagley v. Peddie*, *supra*.



houses been erected must from the nature of the case be a difficult question to decide; and that is one reason why the parties should be left to settle the matter for themselves.<sup>1</sup> In another case an agreement was made simultaneously with a sale of village lots by the purchaser, that he would not sell [507] spirituous liquors on the premises purchased, or in the buildings erected thereon; and if he did so he should be liable to pay the vendor in the first case a fine of \$10, in the second case a fine of \$20, and for each subsequent selling \$50. It was held that the contract was not invalid for being in restraint of trade;<sup>2</sup> but the "fine" was held to be a penalty and not liquidated damages.<sup>3</sup>

§ 291. *Same subject.* The damages for breach of contracts for the purchase of the good will of an established trade or business, or for the withdrawal of competition, are so obviously uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount thereof in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties is all-controlling, and that courts have no power to defeat it on the pretext of relieving from a bad bargain. Referring to such a stipulation, Sedgwick, J., in an early Massachusetts case, said: "The parties were competent in law to make a contract imposing a limited restraint on the defendant's trade for the plaintiff's benefit and without injury to the public. They were competent to determine on what consideration it should be made; and to liquidate the damages if it should be broken. The consideration of one dollar is a valuable consideration. It would be sufficient to pass by sale the defendant's stage and stage horses, where no fraud or imposition was practiced. The parties have considered it reasonable and adequate, and the defendant, by honestly fulfilling his agreement, might have protected himself from the forfeiture. But he has broken it, and he shall not be permitted to say that, although the contract was fairly and honestly made, and for a valuable consideration to which he assented, the consideration was inadequate; that he made a bad bargain; and that when the plaintiff has suffered

<sup>1</sup> *Pearson v. Williams*, 26 Wend. 630, 24 id. 244. See *Chase v. Allen*, 13 Gray, 42.

<sup>2</sup> *Laubenheimer v. Mann*, 17 Wis.

542.  
<sup>3</sup> *S. C.*, 19 Wis. 519.

by a breach of it, he shall be relieved from the terms to which he had voluntarily submitted.”<sup>1</sup> The tendency, however, of [508] more recent decisions is against holding any contract for liquidated damages to be binding in this absolute sense. Courts generally assume jurisdiction to declare an excessive sum mentioned in connection with the breach of any contract a penalty.<sup>2</sup> If the disproportion between the consideration and the undertaking, and the disparity between the probable advantages of performance and the sum agreed to be paid in the event of failure, negative the intention to limit the amount to just or reasonable compensation, they say it should be deemed a penalty, however uncertain the damages. The same principles govern this stipulation in all contracts, but courts will, in general, enforce such stipulations where the damages are uncertain;<sup>3</sup> because the parties, where no fraud or oppression is practiced, know better their situations, and can form a more correct estimate of the injury than a court or jury. Because the damages are not susceptible of precise measurement the judgment and agreement of the parties should have large scope; but when, as sometimes happens, it is discovered that such stipulations are not based on the idea of compensation they are not sustained.<sup>4</sup> This will be particularly seen in the instances of con-

<sup>1</sup> *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Dakin v. Williams*, 17 Wend. 454, per Nelson, C. J.; *Streeter v. Rush*, 25 Cal. 67, per Rhodes, J. Compare *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. Rep. 956, 6 L. R. A. 558, which is mentioned in a note to § 283.

<sup>2</sup> *J. G. Wagner Co. v. Cawker*, 112 Wis. 532, 88 N. W. Rep. 599; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. Rep. 490. See *Davies v. Daniels*, 8 Hawaii, 88.

<sup>3</sup> *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. Rep. 388; *Seeman v. Biemann*, 108 Wis. 365, 375, 84 N. W. Rep. 490; *Simon v. Lanis*, 9 Ky. L. Rep. 59; *Connelly v. Priest*, 72 Mo. App. 673; *Seim v. Krause*, 13 S. D. 530, 83 N. W. Rep. 583; *Hurst v. Hurst*, 4 Ex. 571; *Ponsenby v. Adams*, 2 Brown P. C. 431; *Roy v. Duke of Beaufort*, 2 Atk.

190; *Allen v. Brazier*, 2 Bailey, 55; *Chase v. Allen*, 13 Gray, 42; *Pearson v. Williams*, 26 Wend. 630. See §§ 289, 290.

<sup>4</sup> In *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. Rep. 286, 26 L. R. A. 114, one physician sold his practice to another, stipulating that at the end of a certain time he would cease practicing. The vendee sold the practice to another physician. The defendant violated his agreement, after which he and the plaintiff entered into a contract in which the defendant covenanted not to practice in the locality for ten years, and bound himself in the penal sum of \$400 to that effect. This contract he also violated. It was ruled that the sum mentioned was a penalty; that it was not the intention of the parties that the defendant was to have the

tracts which provide the same sum to be paid in the case of a partial or of a total breach. Stipulations in an agreement by the vendor of a business and its good will that he will not go into business in G., or within a certain distance of it, either for himself or as clerk for another, and will not permit his wife to do so, all refer to the same thing, and the objection that the sum named is a penalty, because the forbidden acts are of different degrees of importance, is without force.<sup>1</sup> After the sale by the vendee of the business and good will of the vendor no beneficial interest in the contract stipulating the damages remains in the covenantor and he cannot enforce the covenant. The purpose of the contract being to protect the property or business to which it related, it was an incident of, and adhered to, such property and business.<sup>2</sup>

The damages which may result from delay in fulfilling contracts for particular works, or for performance of any specified act stipulated to be done and completed within a given time, are not always of the most uncertain nature. Damages for failure to complete a house, or any other structure, may sometimes be ascertained proximately by a rental standard. But when intended for a particular purpose other than to be rented, and when delay may hinder or thwart other and dependent contracts or enterprises, the damages will be more uncertain. In a building contract containing the usual clauses fixing the days for completing the various parts of the work, a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of \$10 per day [509] for every day's detention so caused was held a covenant for stipulated damages.<sup>3</sup> There are authorities to the effect that

privilege of practicing on the payment of it; that, because of the uncertainty of the damages, an injunction would issue for the specific performance of the contract.

<sup>1</sup> *Stover v. Spielman*, 1 Pa. Super. Ct. 526.

<sup>2</sup> *Palmer v. Toms*, 96 Wis. 367, 71 N. W. Rep. 654, approving *Gompers v. Rochester*, 56 Pa. 194.

<sup>3</sup> *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl.

Rep. 140, 39 Am. St. 626; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. Rep. 467; *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. Rep. 354; *De Graff v. Wickham*, 89 Iowa, 720, 52 N. W. Rep. 503; *Emack v. Campbell*, 14 D. C. App. Cas. 186; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) 59; *Pettis v. Bloomer*, 21 How. Pr. 317; *Curtis v. Brewer*, 17 Pick. 513; *Hamilton v.*

the damages ordinarily resulting from the failure to fulfill a building contract which contains only the usual conditions are not so uncertain as to be the subjects for such stipulations, the extrinsic circumstances not being unusual;<sup>1</sup> but the decisions

Moore, 33 Up. Can. Q. B. 100, 520; Gaskin v. Wales, 9 Up. Can. C. P. 314; McPhee v. Wilson, 25 Up. Can. Q. B. 169; Berghelm v. Blaenavon Iron & S. Co., L. R. 10 Q. B. 319; Young v. Gaut, 69 Ark. 114, 61 S. W. Rep. 372; Brown Iron Co. v. Norwood, 69 S. W. Rep. 253, (Tex. Ct. of Civ. App.).

In *Fletcher v. Dyche*, 2 T. R. 32, a stipulation for 10*l.* per week for delay in finishing a church was sustained; in *Duckworth v. Allison*, 1 M. & W. 412, 5*l.* per week for delay in completing repairs on a warehouse; in *Legge v. Harlock*, 12 Q. B. Div. 1015, 1*l.* per day for delay in building a barn, wagon-shed and granary; in *Law v. Redditch*, [1892] 1 Q. B. 127, 100*l.* and 5*l.* per week for delay in constructing sewerage works; in *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 26 N. E. Rep. 256, \$10 a day for delay in erecting dwellings; in *Malone v. Philadelphia*, 23 Atl. Rep. 628, in *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. Rep. 140, 39 Am. St. 626, \$100 per day for failure to complete a grand stand for a race course.

In *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. Rep. 398, the defendants provided for the lease of a building, to be erected, when there was less than six months' time within which to complete it, and they needed protection from the consequences of failure on account of their business which required more room and machinery. In view of the expiration of their lease of the premises in which they were, the uncertainty of their being able to secure another place in which to do business, and the consequences of a removal, a stipulation for the payment of \$50

per day for delay in the construction of such building was sustained although the rental agreed upon was but \$2,000 a year.

In *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 65 N. E. Rep. 129, a stipulation for \$50 per day for delay in completing a church was sustained.

The defendant bound himself to complete a building within eleven months, and was to receive \$100 for each day less than the time limit, and to pay \$1,000 for each day that he should exceed it. He made a contract with the plaintiff for the stone and granite work, and the latter bound himself to pay \$150 per day as a penalty for each and every day he was in default as and for liquidated damages. The latter was an agreement for stipulated damages. *Kunkel v. Wherry*, 189 Pa. 198, 42 Atl. Rep. 112, 69 Am. St. 802.

<sup>1</sup> *Chicago House-Wrecking Co. v. United States*, 45 C. C. A. 343, 352, 106 Fed. Rep. 382, quoting the text; *Wheeldon v. American Bonding & Trust Co.*, 128 N. C. 69, 38 S. E. Rep. 255; *Clements v. Railroad Co.*, 132 Pa. 445, 19 Atl. Rep. 274, 276; *Brennan v. Clark*, 45 N. W. Rep. 472, 29 Neb. 385; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890. But see *Ward v. Hudson River B. Co.* 125 N. Y. 230, 26 N. E. Rep. 256; *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240.

A contract on the part of a railroad bridge builder to provide a crossing for trains by a date fixed or pay \$1,000 a week if he was in default is one for liquidated damages. *Texas, etc. R. Co. v. Rust*, 19 Fed. Rep. 239.

are far from being unanimous on the question. Where a party covenants that he will transport and deliver goods within a certain time, and also that he will deduct a sum named from the freight each day they are delayed beyond the time specified for the delivery, such agreed deduction is liquidated damages.<sup>1</sup> Under peculiar circumstances an agreement to pay \$500 for failure to surrender possession of leased premises at a certain date was sustained as liquidating the damages. The lessor was but a lessee himself, under stipulations to surrender a month later. He had authority from his lessor to put additions and improvements on the premises, all of which he had a right to remove at the end of his term. It was considered a natural and reasonable provision that, should the subtenant bind himself to leave the premises a month before the landlord's term expired, he might have sufficient time to remove his improvements and thus escape a forfeiture to his lessor.<sup>2</sup> An agreement provided that land should be restored to a prescribed condition and in default of performance the person bound should pay £100 per acre. The condition was referred to in one clause of the contract as a "penalty." The house of lords held, reversing the Scotch court, that the case was a proper one for stipulated damages.<sup>3</sup> No damages could be more uncertain than those which might result from delay in furnishing for publication the biography of a man for the time being attracting public notice. Such a man undertook to furnish his biography for publication within a specified time, and for every day's delay beyond that time agreed to pay \$165. In a suit to recover for a delay of one hundred and sixty-one days, the court held the agreement could not be literally enforced, and

<sup>1</sup> *Harmony v. Bingham*, 12 N. Y. 100; *Sparrow v. Paris*, 7 H. & N. 594.

<sup>2</sup> *Peine v. Weber*, 47 Ill. 41.

In *Kling v. Ritter*, 54 Ill. 140, a lease provided for the surrender by the lessee of portions of the property at different times, and without advertent to such provision there was a covenant that the lessee should pay \$50 per day as stipulated damages for every day he should hold

over after the termination of his lease. Because the provision as to damages was highly penal, and the lease admitted of two constructions as to the time the damages should begin to accrue, they were not considered as commencing until the time when the entire premises were to be surrendered.

<sup>3</sup> *Lord Elphinstone v. Monkland Iron & C. Co.*, 11 App. Cas. 332.

that the plaintiff could only recover actual damages.<sup>1</sup> So a [510] contract to put machinery in a boat for \$8,000, on or before a certain day, "under a forfeiture of \$100 per day for each and every day after the above date until the same should be completed as above," was held to provide for a penalty and not liquidated damages.<sup>2</sup>

§ 292. Same subject. The damages which may result from a mechanic quitting work contrary to his contract are uncertain; but every agreement purporting to fix the amount he shall forfeit or pay in such an event will not be treated as a liquidation thereof. Where the contract of hiring required that if the employee quit without giving thirty days' notice he should forfeit all wages due him at the time of leaving, Campbell, J., said: "We have no difficulty in holding that the injury caused by a sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed upon, and should not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation if both parties are equally and justly protected. But the facts set forth in this record do not, we think, bring the case within any such rule. . . . The forfeiture under the contract covers all wages due at the time of leaving. This is open to the objection that the employer may have been in arrears, and thus enabled to profit by his own wrong. No such forfeiture could be enforced against wages, as such, which the workman was to have paid to him before he committed any breach of his duty. Again, it does not appear how often wages were payable, and what proportion of the year's earnings could thus be withheld for a breach of contract. It would not be reasonable to make the forfeiture cover a very long period. The inference, in the absence of proof to the contrary, would be that the price of work done by the piece might not be payable at the same intervals as ordinary wages. And

<sup>1</sup> Greer v. Tweed, 13 Abb. Pr. (N. S.) 427. See Laubenheimer v. Mann, 17 Wis. 542, 19 id. 519.

<sup>2</sup> Colwell v. Lawrence, 38 Barb. Ct. of Cls. 122, 142.

inasmuch as the periodical earnings of such laborers could not be uniform it would be difficult to sustain an agreement for stipulated damages, unless some limit should be fixed beyond which the forfeiture should not extend. The agreement [511] set out in the record is also defective for want of mutuality. The employer, on failure to give notice before dismissal, is subjected to a payment of thirty days' wages. This stipulation, when applied to the wages of piece work, is entirely vague and indeterminate. It furnishes no standard of calculation, and lacks the first essential of stipulated damages, which are allowed to avoid uncertainty."<sup>1</sup> Where the employee's contract

<sup>1</sup>Richardson v. Woehler, 26 Mich. 90; Davis v. Freeman, 10 Mich. 188.

In the last case Manning, J., said: "The plaintiffs in error were to have \$1.50 per M. for drawing the timber, \$1 of which was to be paid as the timber was drawn, in supplies to enable them to carry on the job; and the remaining fifty cents in cash when all the timber was drawn. In the language of the contract, 'it being understood that the balance kept back is to secure the completion of this contract; and it is hereby agreed between the parties that the fifty cents per thousand feet is settled, fixed and liquidated damages, in case this contract is not completed by the said first party.' They having failed to draw all the timber, the question is whether the fifty cents per thousand feet on what was drawn, and which was to be paid on completion of the contract, is to be regarded as stipulated damages, or in the nature of a forfeiture or penalty for not completing the contract. The court below charged the jury that the fifty cents per thousand feet on what had been drawn was stipulated damages. In this we think the court erred. If stipulated damages for a non-performance of the entire contract, the defendant in error could not recover any other or greater damage for a non-performance, in whole or in part.

And it would follow that he would recover no damages whatever on the contract had the plaintiff in error refused to draw any of the timber. Such clearly could not have been the intention of the parties. They must have intended that if the plaintiff in error should draw part of the timber, and not the whole, they should not be paid the fifty cents per thousand feet on what had been drawn by them. That, in the language of the contract, should be 'fixed and liquidated damages.' If the contract had provided for the payment of fifty cents per thousand feet as liquidated damages for the timber not drawn, the case would be altogether different. For the nearer such a contract was completed the less would be the damages. The damages would be proportioned to the non-performance. But the contrary would be the case as the contract is, if the fifty cents per thousand is to be regarded as liquidated damages, and not as penalty. For the nearer the contract is completed the greater are the damages in case of failure. The damage for not drawing five thousand of five hundred thousand feet would be \$247.50, whereas the damages for failing to draw four hundred and ninety-five of the five hundred thousand would be only \$2.50. The policy of the law will not permit parties to

stipulating the damages the employer might recover if the contract of employment was violated was neither unreasonable nor oppressive the stipulation was sustained under the facts indicated in the following excerpt from the opinion: The plaintiff in error was a cotton mill, having in its employment hundreds of hands. The work is divided up into many departments. The raw material is handled by one set of hands and put in condition for another, and the second department still further advances its manufacture; and so on through the successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employee's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill and throw other hundreds out of employment. . . . The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be determined, requires the courts to uphold the contract as one for liquidated damages and not as providing for a penalty.<sup>1</sup> The uncertainty of the damages which follow the breach of a contract by actors with a theatrical manager for their services for a stated period by performing in another

make that liquidated damages, by calling it such in their contract, which in its nature is clearly a penalty or forfeiture for non-performance. While it allows them, in certain cases, to fix their own damages, it will in no case permit them to evade the law by agreement. See *Jaquith v. Hudson*, 5 Mich. 123." *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223.

In *Schrimpf v. Tennessee Manuf. Co.*, 86 Tenn. 219, 8 Am. St. 832, 6 S. W. Rep. 131, a servant agreed to

give notice of his intention to quit, and if he failed to do so whatever was due him at the time he left the service was to be an indebtedness to the employer to be considered as liquidated damages. The contract was held void because it was unreasonable and oppressive.

<sup>1</sup>*Tennessee Manuf. Co. v. James*, 91 Tenn. 154, 161, 30 Am. St. 865, 15 L. R. A. 211, 18 S. W. Rep. 263; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. Rep. 437, 76 Am. St. 865.



theatre before the fulfillment of their engagement with him sustains a stipulation fixing the damages for its breach.<sup>1</sup>

The inquiry whether a fixed sum is intended as penalty or liquidated damages is generally answered according to the equity and justice of the particular case. If the damages are uncertain in their nature, or difficult to be proved, and in applying the stipulation to the case the result is not manifestly at variance with the principle of just compensation, it is readily adopted as consistent therewith. In such cases the intention is inferred from these circumstances, and the language of the parties is very liberally construed to give effect to it. The sum may be called a penalty or forfeiture, or the form and phraseology may be vague and equivocal; but, nevertheless, the sum stated be held to be liquidated damages.<sup>2</sup>

**§ 293. Same subject; illustrations.** Some differences will be noticed, resulting from a stricter adherence to the artificial rules of construction by some courts than by others. On the other hand, where the actual damages may be ascertained by mere computation, or can be easily established by proof, and the sum stated is not a just measure of the actual loss or injury, these circumstances prevail against very clear and positive expressions of intention to liquidate damages.<sup>3</sup> In cases of neutral circumstances the language and form of the contract may alone be decisive. All doubts as to the justice of the stipulated sum, or as to the actual intention of the parties, will be resolved by treating it as a penalty. Many stipulations ostensibly providing a remuneration to be paid, or in some way to inure to the party entitled to the benefit of the contract in case of a breach, have been held not to have the effect to liquidate damages because so framed as to be inconsistent in their effect with the idea of compensation either for the reason that the intention to limit the compensation for

<sup>1</sup> *Pastor v. Solomon*, 26 N. Y. Misc. 125, 55 N. Y. Supp. 956, affirming 25 N. Y. Misc. 322, 54 N. Y. Supp. 575.

<sup>2</sup> § 283, n.; *Mathews v. Sharp*, 99 Pa. 560; *Lennon v. Smith*, 14 Daly, 520; *Miller v. Rankin*, 11 Atl. Rep. 615 (Pa.); *Eakin v. Scott*, 70 Tex. 442, 7 S. W. Rep. 777; *Boys v. Ansell*, 5 Bing. N. C. 390; *Streeper v. Williams*, 48 Pa. 450; *Burr v. Todd*, 41 id. 206;

*Bigony v. Tyson*, 75 id. 157; *Pearson v. Williams*, 26 Wend. 630; *Knapp v. Maltby*, 13 id. 587; *Upham v. Smith*, 7 Mass. 265; *Fisk v. Fowler*, 10 Cal. 512; *Sparrow v. Paris*, 7 H. & N. 594; *Yenner v. Hammond*, 36 Wis. 277; *White v. Arleth*, 1 Bond, 319; *Haymaker v. Schroers*, 49 Mo. 406.

<sup>3</sup> *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678.

[513] breach to such amount as the provision in question may specify, or the purpose to afford compensation to that extent is doubtful in view of the special facts of the case. A few cases may be profitably consulted as illustrations of the uncertain nature of such stipulations, and how much at large is the judicial discretion by which their practical effect is governed. In a case in New York two parties agreed upon an exchange of real estate; each was to deliver a deed of his property or "forfeit the sum of \$500." Upon the first trial the court held this to be a provision for liquidated damages, and the plaintiff had a verdict for that sum, which was set aside on the defendant's motion, upon the ground that the court erred in treating that sum as other than a penalty. The case was retried upon this theory, and resulted in a verdict for the plaintiff of \$1,000 against his request and exception that it should be regarded as stipulated damages. The defendant then sought to reverse the judgment on the ground that the sum stated in the contract was not a penalty, but liquidated damages. The ruling that it was a penalty was in harmony with the defendant's argument for a new trial, and he had taken no exception to a like construction of the contract on that trial. He was, therefore, not in a situation on appeal to allege that that construction was erroneous. Church, C. J., said: "It is, however, proper to say that, if the question was before us, we should hesitate in holding it a penalty; and there are many reasons for regarding it as a provision fixing the measure of damages by the parties. The word 'forfeit' is not conclusive. A fundamental rule upon this subject is that the words employed must, in general, yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named, and all the surrounding circumstances. The sum named is reasonable in amount; it is payable for one breach, viz.: a failure to deliver a deed; and the injury is in some degree uncertain in amount and extent, and might depend upon many unforeseen contingencies. These are material circumstances favorable to an inference that the parties intended to fix the sum as the measure of damages." But that question being precluded, by the absence of any objection on the appellant's part, the judgment was affirmed.<sup>1</sup>

<sup>1</sup> *Noyes v. Phillips*, 60 N. Y. 408.

In a later case in the same state an ice company agreed [514] to deliver to K. four thousand tons of ice in 1870, for retail. Afterwards the company, by fraudulent representations, procured from K. a written exoneration as to all the ice above five hundred and eighty-seven tons. By the original agreement K. agreed to *pay* the ice company \$1 per ton for each and every ton that he failed to take according to the terms of the agreement; and the ice company agreed to *forfeit* \$1 per ton for each and every ton that they failed to deliver according to the terms of the agreement. The contract price of the ice delivered was \$2.50 per ton, and the market price, when the exonerated quantity should have been delivered, was from \$14 to \$16 per ton. A suit was brought for rescission of the agreement obtained by fraud, reducing the quantity, and for damages. The rescission was granted, and the next question was between penalty and liquidated damages under the \$1 per ton clause referred to. The court of common pleas held that the stipulation was a penalty.<sup>1</sup> The court of appeals were of contrary opinion. Earl, J., said: "What was here intended by the parties? The \$1 was certainly intended at least to limit the extent of damages to be paid in case of breach, else there would be no purpose for inserting it; and effect should be given to this intention if it can be consistently with the rules of law. There is nothing decisive in the language used. In case of failure by the plaintiffs they agreed 'to pay' the \$1, in case of failure by the defendant it agreed 'to forfeit' the same sum. The words 'to pay' and 'to forfeit' were evidently used in the same sense,<sup>2</sup> and might be used in case the sum was intended either as liquidated damages or as a penalty."<sup>3</sup> In another case, a

<sup>1</sup> *Kemp v. Knickerbocker Ice Co.*, 51 How. Pr. 31; *Basye v. Ambrose*, 28 Mo. 39. See *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716.

<sup>2</sup> § 283, n.

<sup>3</sup> *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, 57; *Winch v. Mutual Benefit Ice Co.*, 9 Daly, 117.

In *Lowry v. Barelli*, 21 Ohio St. 324, one party offered to sell and deliver at a specified time and place two thousand five hundred cubic feet of Italian marble at \$2.12½ per foot.

and there was added the following provisions: "For non-compliance with this contract by either party the penalty shall be as follows: If the parties of the first part are not themselves, or agents, on the spot twenty days after the stipulated notice be given, then the parties of the second part shall be at liberty to sell said marble just as if consigned to them, and claim of said first parties the difference between the net amount that the marble sold at, and

[515] building contract, the builder was to receive for the completed house \$4,600; the contract contained the provision that the builder, who was the plaintiff, should "forfeit ten per cent. on the whole amount if the said house is not entirely com-

what they bound themselves to pay for it, say \$2.12½ per cubic foot; provided always, that said difference shall never exceed thirty-seven and one-half cents per cubic foot, which difference shall be paid down, in cash at once, without any difficulty; and should the parties of the second part fail to deliver within the specified time the quantity of marble above mentioned, the parties of the first part shall be at liberty to buy the same quantity of marble at the market price, and charge the difference, if any, to the parties of the second part; provided always, that the difference of the marble so purchased shall not exceed thirty-seven and one-half cents per cubic foot of the price fixed by this agreement, and that the terms of payment be cash." The vendee sued the vendor and assigned as a breach the non-delivery of the marble. The jury found, among other things, that "the defendants refused to perform the agreement on their part; that the plaintiffs did not purchase, nor attempt to purchase, marble corresponding to that described in the contract before bringing suit; that such a lot of marble could not have been purchased in New Orleans where the contract was made; that the difference between the market price and the contract price on the day of breach was greater than thirty-seven and a half cents per foot; that the damages of the plaintiff amount to \$1,516.62," for which sum they returned a verdict. A motion for a new trial was made on the ground, among others, that the verdict was contrary to the law and the evidence. On this motion it was contended on

behalf of the defendants "that the sum of thirty-seven and a half cents per foot is in the nature of a limitation of damages, and not actual or liquidated damages, and is the utmost that the parties can recover." This point was not noticed in the opinion, which was adverse to the motion, and judgment was ordered to be rendered on the verdict. McIlvaine, J., said: "It is no doubt competent for parties to limit by express stipulation the amount of damages to be recovered in the event of a breach of their contract; or to make the right to recover at all to depend upon a particular event; or they may agree that damages shall not be recovered in any event for a violation of the contract; thus making what would otherwise be a contract binding in law a mere option on the part of the promisor to do or not to do as he may choose. In our opinion the contract between the parties in this case was of the first and not of the second or third classes named. Taking it altogether, we believe the parties intended to secure the performance at what they supposed would be a reasonable compensation to the injured party in case of a default by the other in not receiving or delivering the marble.

"It cannot be doubted that the parties intended to bind each other by this contract to the purchase and sale upon the terms named therein. For the breach of every contract the law implies damages; and to escape the consequences of this rule of law the party in default should be able to show that damages had been waived. In this contract no waiver or exemption from damages upon

pleted and fit to occupy at the time agreed upon." Daniel, J., said: "The clause . . . cannot properly be regarded as an agreement or settlement of liquidated damages. The [516] term 'forfeiture' imports a penalty; it has no necessary con-

the state of facts found in the special verdict is expressed, nor can it be inferred except upon the principle that *expressio unius est exclusio alterius*. This maxim, however, should not be applied in a case where, by fair construction of the whole instrument, a different intention can be ascertained. . . . Whatever might have been the law of this case, had there been such marble in the market at the time of the defendant's default, we are of opinion that the plaintiffs, under the state of facts found in the special verdict, were excused not only from making a purchase of a like quantity of marble in the market, but also from any vain and fruitless effort to do so."

In *Grand Tower Co. v. Phillips*, 23 Wall. 471, a company having coal mines agreed to deliver one hundred and fifty thousand tons of coal, the product of its mines, to P. at \$3 a ton during the year 1870, in equal daily proportions, between the 15th of February and the 15th of December; that is to say, fifteen thousand tons each month. The contract contained this provision: "If through no fault of the parties of the second part (P.), the party of the first part (the company) shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part as liquidated damages twenty-five cents per ton for each and every ton which it may have so failed to deliver; or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next

succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default." Coal rose in value from about \$3 a ton to \$9; and without the fault of P. the company did fail to deliver the quota — fifteen thousand tons — due in October, and P. thereupon elected and gave notice of the election to take the said quota in November. But the company failed to deliver it then, and failed also to deliver the quota — fifteen thousand tons — due in November. P. then elected and gave notice of his election to take in December the quota due in November, as also that due in October. No coal, however, was delivered at any time, and P. brought suit for damages. It was held that the plaintiffs were entitled to their actual damages and were not limited to twenty-five cents per ton. Bradley, J., said: "The question whether this view is right or not depends upon the true construction of the agreement made by the parties. . . . It is evident from an inspection of the contract that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal, the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected

nection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation it is never taken as such by courts of justice."<sup>1</sup> The lessor for years of part of a steam mill covenanted with his lessee to furnish him with a certain amount of steam-power during every working day in the year, and that if at any time he should fail to do so the rent should cease during the time of such failure. The lessee had taken a lease for five years for the purpose of carrying on business, and had placed machinery on the premises on the faith of the lessor's covenant to furnish him steam-power to work it. Soon after his work commenced the lessor withheld all the power and thus broke up the business. On these facts the court held that the suspension of rent was not full satisfaction of the damages; it was not satisfied that the lessee had agreed to accept such suspension as a full compensation for an entire breach of the covenant.<sup>2</sup>

to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs, the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it—a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be delivered at all events, and if they elected to do this it was the duty of the defendant to furnish it. The contrary construction would make the stipu-

lation worse than useless. The plaintiffs might continue to exercise their election to receive the coal month after month, without avail, and, at the end, find themselves exactly at the point they started from—forced to accept the twenty-five cents per ton."

<sup>1</sup> Van Buren v. Digges, 11 How. 461. See § 283, n.

<sup>2</sup> Fisher v. Barret, 4 Cush. 381; Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

In Nowlin v. Pyne, 40 Iowa, 166, there was an agreement between the parties for exchange of farms, which contained this clause: "It is also understood that, in case the said P. fails to make said conveyance, as aforesaid, then he agrees to pay said N. for all plowing done by him on said land." The question was whether N. was entitled to any other damages. It was contended by the

The general doctrine was well summed up in a Penn- [519]sylvania case. The owners of a hotel had agreed to sell it for \$14,000, of which \$3,000 was to be paid at a specific time, when a deed was to be made; part possession was to be deliv-

other party that he was not. Day, J.: "This position would be correct if the parties to a contract must stipulate for the damages to be recovered in order that they may recover any. But the law, of itself, attaches to the breach of every contract the right to recover proper damages. That the parties have expressly provided for the payment of some of the damages, which, perhaps, the law would not have awarded without such provision, cannot be construed to be a waiver of the right to recover other damages which the law permits. In order to defeat the recovery of such damages it must clearly appear that the parties have stipulated for all the consequences which they intend shall follow a breach of their agreement. It is plain that this agreement more particularly refers to certain incidental damages which might not arise at all, whilst as to the principal damages, and which are certain to follow a breach of the contract if it was an advantageous one to the plaintiff, the contract is silent."

In *Potter v. McPherson*, 61 Mo. 240, there was a contract between the parties for constructing a railroad, by the terms of which payments were to be made by the employer in monthly instalments, ten per cent. being reserved by him until the completion of the work, "as security for the faithful performance of the contract;" and in case of certain breaches on the part of the contractor the amounts reserved were to be absolutely forfeited to the other party. Held, that the amounts so to be retained were not liquidated damages for such breaches, but the con-

tractor could recover the entire sum agreed upon, less the damages which in fact might be sustained by reason of his non-compliance with the contract. Hough, J., said: "To hold otherwise in such a case would produce the grossest inequality and injustice. The amount forfeited might bear no just relation to the damage suffered. The more nearly the contract approaches completion, the greater would be the reserve, and the less would be the damage. As the damage diminished the sum forfeited would increase." *Savannah, etc. R. Co. v. Callahan*, 56 Ga. 331. See *Phelan v. Albany, etc. R. Co.*, 1 Lans. 258; *Jemmison v. Gray*, 29 Iowa, 537; *Faunce v. Burke*, 16 Pa. 469, 55 Am. Dec. 519; *Hennessey v. Farrell*, 4 Cush. 267; *Jackson v. Cleveland*, 19 Wis. 400.

*Easton v. Pennsylvania & O. C. Co.*, 13 Ohio, 79, was a similar case, the contract providing for monthly payments, and a reserve of fifteen per cent. to insure the completion of the work; and also that in case of its too slow progress, and in certain other contingencies, the president of the company or the engineer should have power to determine that the contract had been abandoned, and such determination should put an end to it, and exonerate the company from every obligation arising therefrom, and then the job might be disposed of as though the contract had never existed. It was declared abandoned because, in the opinion of the engineer, the work was not being prosecuted with sufficient force to insure its completion within the time agreed on. Suit was brought by the contractor to recover

ered at once, and in the contract the parties agreed to forfeit [520] \$500 in case either failed to comply with its terms. It was held that the forfeiture was intended by them as a compensation to either in case the other wholly abandoned the contract and was liquidated damages, not a penalty. As the general rule of damages might not embrace all the compensation the parties deemed would be due in view of the probable risk, trouble, loss and expense incident to the contemplated change on the part of either party, they were regarded as having fixed the sum stipulated as the amount of damage

the fifteen per cent. reserved in monthly payments for work done. Woods, J., said: "The contract may be supposed to be severe upon the plaintiffs. They were, however, by no means forced to execute it. It was voluntary. By its terms, extensive control over the work is conferred upon the defendant, and great confidence reposed in the honest and faithful exercise of his discretion. If the defendant has violated neither its letter nor its spirit it is difficult to see what reasons the plaintiffs have for complaint. We sit here to enforce the contracts made by others, but we have no authority to impose upon them obligations to which they have never assented. The plaintiffs were to be paid monthly on estimates made monthly by the engineer. It has been done. Fifteen per cent. was to be retained to insure the completion of the work. The defendant kept back this amount. If the contract was declared abandoned, the determination of the president or engineer is conclusive. The contract is at an end, and the defendant exonerated from every obligation thence arising by express agreement. It is insisted that when the whole work is completed the fifteen per cent. may be recovered by the plaintiffs. Had they finished the work the position would be cor-

rect, but if the contract is abandoned, relet and others complete the work, the amount retained as security is in its nature liquidated damages. If it were not so intended, there would be no security in the retention of this amount. . . . The president or engineer is the umpire between the parties. His determination ends the contract and exempts the company from its obligations. The agreements of the parties are the law by which their rights are to be determined, and I am extremely doubtful, at least, whether any court can legitimately interfere and upset their arrangements when an honest discretion has been exercised, where neither fraud nor circumvention has intervened. I am instructed by my brethren, however, to say, as the opinion of the court, that in this class of cases the subject is open to inquiry whether the contractors had done any act, or omitted the performance of any duty which, within the terms of the contract between the parties, would justify the president or engineer in declaring it abandoned; and if no such act had, in fact, been done, nor duty omitted, the honest exercise of the discretion conferred to abandon the contract ought not to shield the defendant from the payment of the per centum so retained."



each would suffer from a total failure; and the word "forfeit" was outweighed by the other elements of interpretation and meant "to pay." Agnew, J., said: "It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases the courts gave more weight to the language of the clause designating the sum as penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof or the difficulties of reaching the damages by proof have induced them to make the damages a subject of previous adjustment. In some cases the magnitude of the sum and its proportion to the probable consequence of a breach will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is that in each case we must look at the language of the contract, the intention [521] of the parties as gathered from all its provisions, the subject of the contract and the surroundings, the ease or difficulty of measuring the breach in damages and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case."<sup>1</sup>

<sup>1</sup> *Streeper v. Williams*, 48 Pa. 450; *Shreve v. Brereton*, 51 id. 175; *Emery v. Boyle*, 200 id. 249, 49 Atl. Rep. 779; *Robeson v. Whitesides*, 16 S. & R. 320. case of the breach of the contract the purchaser was bound "in the penal sum of \$5,000 as liquidated damages." The difficulty of establishing the actual loss was so great that the stipulated sum was recoverable. *May v. Crawford*, 142 Mo. 390, 44 S. W. Rep. 260, 150 Mo. 504, 51 S. W. Rep. 693.

A contract for the use of a patent right for six years designated the annual license fee to be paid by the licensee and bound him, if he used it after the expiration of the term without a new license, to pay double the stipulated rate. This was sustained as an agreement for stipulated damages. "As the parties could not know in 1888 what the value of the use of the patent might be after 1894, it was certainly a proper subject for agreement between them as to what should be paid as damages should the defendant continue to use the patent without license after the expiration of the term, and this they did by agreeing on the sum of \$500. It could hardly have been the intention of the parties that the right of the plaintiff, in case use should be made of the patent after the expiration of five years, should be limited each year to the actual damages he might be able to show that he sustained from the use made. It would be difficult to lay down a principle by which such damages could be estimated by a jury.<sup>1</sup> There is general concurrence in the view that the uncertainty concerning the amount of coal, ore or oil the lessee of a mine may take therefrom and the corresponding uncertainty as to the royalties the lessor will receive make provisions stipulating that not less than a certain quantity of coal, ore or oil shall be taken each year binding as agreements for stipulated damages.<sup>2</sup> In a case where the language used was not explicit as to the intention of the parties, the words "stipulated damages," or any similar term not being used, their omission was regarded as of some significance as to such intention; and the uncertainty of the damages was urged as a reason for construing the contract as one for stipulated damages. That argument was thus an-

Where a street railroad company and the trustees of a village contracted for the construction of a road and the former deposited \$10,000 as a guaranty of its good faith and stipulated that the same should become the property of the village as liquidated damages in case of its default, such stipulation was binding. *Peekskill, etc. R. Co. v. Peekskill*, 21 App. Div. 94, 47 N. Y. Supp. 305, affirmed without opinion, 165 N. Y. 628.

<sup>1</sup> *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361, 60 N. E. Rep. 563, 16 Ohio Ct. Ct. 21.

<sup>2</sup> *Coal Creek, etc. Co. v. Tennessee Coal, etc. Co.*, 106 Tenn. 651, 678, 62 S. W. Rep. 162; *Lehigh Zinc & Iron Cor. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. Rep. 219; *Flynn v. White Breast Coal & Mining Co.*, 72 Iowa, 738, 32 N. W. Rep. 471; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. Rep. 937; *Powell v. Burroughs*, 54 Pa. 329.

swered: There is no presumption in the law that damages resulting from the breach of an obligation to convey a mining claim cannot be calculated by market value or estimated by reference to pecuniary standards; nor is there a presumption that it would be impracticable or extremely difficult to fix the actual damage in such case. True, evidence of a character different from that adduced to show the value of lands used for purposes other than mining may be required, and its procurement may be attended with difficulty and expense; but, nevertheless, the law does not raise, and the courts do not indulge, the presumption that proof of the value of such a claim is impracticable. In the absence of exceptional circumstances, a promise to pay a certain sum of money if the promisor fail to perform his agreement to convey land is mere security and a penalty;<sup>1</sup> and this rule is applicable to mines as well.<sup>2</sup>

§ 294. **Stipulation for payment of a fixed sum for partial or total breach.** Contracts often contain a variety of stipulations of unequal importance and, therefore, admitting of many breaches for which the damages would be different in amount. In such a case a total breach would involve an injury greater than that which would result from the infraction of a particular stipulation. Hence it is self-evident that a sum stipulated to be paid, either for breach of one of the minor provisions or of the whole contract, could not be a liquidation of damages on the principle of compensation for actual injury. The sum would either be too great for a partial breach or wholly inadequate to one which involved the loss of the whole contract.<sup>3</sup> Hence, if the agreement cannot be appropriated to

<sup>1</sup> Dooley v. Watson, 1 Gray, 414.

<sup>2</sup> O'Keefe v. Dyer, 20 Mont. 477, 483, 52 Pac. Rep. 196.

<sup>3</sup> Hoagland v. Segur, 38 N. J. L. 230.

In *Pennypacker v. Jones*, 106 Pa. 237, the stipulation was that machines put into a mill should have a designated capacity to make high grades of flour, and if the results were not as promised the machines were to be retained without payment being made for them. The court observe that nothing was "said to the effect, either that for any breach the entire

machinery may be retained without payment for it, or that for a gross breach it shall be retained as stipulated damages. No sum is fixed either as a penalty or as liquidated damages. It is manifest that if the defendants produced all the results agreed upon except a deficiency of one or two barrels in the daily product, the forfeiture of the entire contract price of the machinery would be entirely out of proportion to the damages sustained. Again, the letter of this provision of the contract is that

a total breach, but applies by necessary construction to such as would cause trifling loss or inconvenience, as well as to those of great importance, such sum is a penalty. Parke, B., said: "The rule laid down in *Kemble v. Farren*<sup>1</sup> was that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by way of damages for breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. . . .

[522] When the parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute or unimportant, they must be considered as not meaning exactly what they say; and a contrary intention may be collected from the other parts of the agreement."<sup>2</sup>

But in a later case<sup>3</sup> he is reported to have said of the same case: "That decision has since been acted upon in several cases, and I do not mean to dispute its authority. Therefore, if a party agree to pay 1,000*l.* on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of

the machines may be retained if the results are not as promised. This relates only to the non-production of the results contracted to be produced, that is, that the mill should have a capacity of two hundred barrels daily, with full modern percentage of high grades flour equal in quality to best in market. It makes no provision for damages for other breaches of contract, which may occur consistently with the production of the results stated. One of the items of damage sustained by the plaintiffs was that it took a greater quantity of grain to produce a barrel with the defendants' machines than with the ordinary process, and the referee has found especially that from this source alone there was a positive loss of \$1,096.75. This is a species of direct loss for which we think there can be a recovery. The

cost to which the plaintiffs were subjected in repairing the mill after the defendants ceased work is also a direct loss arising from the defective machinery furnished, and it is not provided for in the contract. We think it clear that none of these items come within the terms of the stipulation for the retention of the machines, and that it was not within the contemplation of the parties that they should. We therefore consider that the provision for the retention of the machines was only in the nature of a penalty, and that the true measure of damages is the loss actually sustained, flowing directly from the defects in the defendants' machines."

<sup>1</sup> 6 Bing. 141.

<sup>2</sup> *Horner v. Flintoff*, 9 M. & W. 678.

<sup>3</sup> *Atkins v. Kinnier*, 4 Ex. 776.

which cannot be measured, then the parties must be taken to have meant that the sum agreed on was liquidated damages and not a penalty." And the same antithesis is stated by him in another case: "Where a deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But when the damages are altogether uncertain, and yet a definite sum of money is expressly made payable in respect to it by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty."<sup>1</sup> This latter distinction has been recognized and followed in other cases in England and in America.<sup>2</sup>

<sup>1</sup> *Green v. Price*, 13 M. & W. 695; affirmed, 16 id. 346.

<sup>2</sup> *Emery v. Boyle*, 200 Pa. 249, 49 Atl. Rep. 779; *Carpenter v. Lockhart*, 1 Ind. 434.

*Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716, was decided on this distinction. Ruggles, J., said: "It is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of \$500 was made payable for the non-performance of any or either, it must be a penalty, and not liquidated damages. This doctrine, in the cases in which it is asserted, is traced to the cases of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141. But I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is, that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a

penalty in regard to one of the stipulations to be performed is a penalty as to all. In *Kemble v. Farren Tindal*, C. J., says that if the clause fixing the sum for liquidated damages 'had been limited to breaches which were of uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach;' thus rejecting the doctrine contended for by the defendant's counsel in the present case. It is true that the doctrine thus contended for has been adopted in some English and in several American cases: hastily, I should think, and without careful examination of the cases from which it is supposed to be derived. But if it should be considered as having any solid foundation in principle, it should be applied only in subordination to the general rule, which requires the courts in these, as in all other, cases to carry into effect the true intent of the parties. It should never be applied to cases like the present, where the amount of damages is uncertain from the nature of the subject itself; and incapable of proof, not only from that uncer-

In a recent English case there is a very full discussion of the earlier cases, and the conclusion reached is that a contract to pay a sum of money if there shall be a breach of the stipulations contained in it, they being of varied importance and none of them trivial nor conditioned for the payment of specified amounts of money, provides for liquidated damages.<sup>1</sup> In the case referred to the plaintiff agreed to sell an estate for 70,000*l.* to the defendant; the latter was to build upon it and complete the buildings within ten years. A deposit of 5,000*l.* was to be paid by the defendant. The agreement provided that "if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in failing to perform any of the provisions therein contained, then, and in either of the said events, the deposit money of 5,000*l.* was to be forfeited; and if the balance of such deposit had not then been paid the defendant should forfeit and pay a sum of money equal to such balance, the intention being that if default was made by the defendant as aforesaid he should forfeit and pay to the plaintiff by way of liquidated damages the sum of 5,000*l.*, and the agreement to be void and of no effect." The defendant paid no part of the deposit, expended nothing on the estate and performed none of the acts stipulated for. A suit was brought to recover 5,000*l.* as liquidated damages, and the court of appeal held, affirming the judgment of Fry, J., that such sum was recoverable. It was pointed out by Jessel, M.

tainty, but from the circumstances already stated; and where, for these reasons, there was a necessity for ascertaining them by estimate by the parties in their contract. The only plausible ground for withholding the doctrine in any case is, that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may properly be applied to

some cases, I cannot think it ought to be applied to the present. The injustice it professes to avoid is no greater than that which is tolerated in many other cases for the purpose of enforcing a faithful performance of contracts." *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713.

<sup>1</sup> *Wallis v. Smith*, 21 Ch. Div. 243, followed in *Schrader v. Lillis*, 10 Ont. 358, notwithstanding the court of appeal had, previous to the decision of *Wallis v. Smith*, announced the contrary doctrine in *Craig v. Dillon*, 6 Ont. App. 116.

R., that, although the *dicta* in the earlier cases<sup>1</sup> seemed to lay down a positive rule, the actual decisions were in cases where one or more of the stipulations was or were for the payment of a sum of money less than that named as liquidated damages. He said: "Although I wish to leave the question open, where there are several stipulations, and one or more is or are of such a character that the damages must be small, I do not wish for a moment to abstain from stating my opinion that there is no such doctrine where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice Heath,<sup>2</sup> and apparently approved of by Lord Justice James.<sup>3</sup> There is neither authority nor principle for such doctrine, and I cannot see that it is established by any case which is binding on this court." Lord Justice Cotton said: "It is not sufficient, in my opinion, to say that the covenants to the breach of which this applies are of varying importance. That may be so, but yet the parties may very reasonably come to the conclusion that they will agree between themselves that the sum mentioned shall be assessed between them as the damages in consequence of the breaches of these various covenants. Probably there may be an exception, that where some of the covenants are of such a character that obviously the damages which can possibly arise from a breach in any way of that covenant would be very insignificant compared with the sum which has been fixed by the parties, there the court will give the non-natural construction to the terms used by the parties. In my opinion that comes within the same principle as where the courts have interfered, where one of the covenants has been for payment of a sum of money where the damage is capable of being assessed accurately, and is very much below the sum named." This decision is correctly interpreted to mean "that an agreement with various covenants of different importance is not to be governed by any inflexible rule peculiar to itself, but is to be dealt with as coming under the general rule that the intention of the parties

<sup>1</sup> *Astley v. Weldon*, 2 B. & P. 346, v. *Local Board of Redditch*, [1892] 1 Q. B. 127.

*Reynolds v. Bridge*, 6 E. & B. 540; <sup>2</sup> *Astley v. Weldon*, *supra*.

*Atkins v. Kinnier*, 4 Ex. 788; *Galsworthy v. Strutt*, 1 id. 659. See Law <sup>3</sup> *In re Newman*, *supra*.

themselves is to be considered. If they have said that in the case of any breach a fixed sum is to be paid, then they will be kept to their agreement unless it would lead to such an absurdity or injustice that it must be assumed that they did not mean what they said.”<sup>1</sup>

This doctrine has been adhered to in the court of appeal in a case in which the lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same; it also provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold. It appeared that there was a substantial difference between the manurial value of hay and that of straw. This difference was sufficient to make the stipulation one for a penalty, regardless of the use of that word by the parties. Lord Esher, commenting on the following language used by the court in *Lord Elphinstone v. Monkland Iron and Coal Co.*,<sup>2</sup> “When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling, damage, the presumption is that the parties intended the sum to be penal, and subject to modification,” said: I think the effect is substantially the same as if, instead of the words “some of which may occasion serious and others but trifling damage,” he had said “some of which may occasion serious and others less serious damage.”<sup>3</sup>

[523] § 295. **Same subject.** Whether the damages are certain or not, a fixed sum made payable on the happening of one or of several events, each of which will be the occasion of some loss, cannot be deemed a sum intended for compensation unless the stipulations are all of primary importance and the damages resulting from their breach are equally uncertain, or the provisions are parts of one whole, steps in the accom-

<sup>1</sup> *Mayne on Dam.*, 6th London ed., 160.

<sup>2</sup> *L. R.* 11 App. Cas. 332, 342.

<sup>3</sup> *Willson v. Love*, [1896] 1 Q. B. 626. One of the judges was in doubt as to whether the conclusion arrived at was correct. A majority of them

disapproved *Wright v. Tracey*, *Irish Rep.* 7 C. L. 134, which held that one sum was to be paid in the event of the breach of any one of several stipulations of varying degrees of importance.



plishment of one end, and to be regarded as a single contract. Otherwise, no stipulation can operate on that principle. In many courts the law is held to be that a sum is stipulated damages when it conclusively appears that the parties have intentionally adopted it for that purpose. But where the courts proceed on the theory that there can be no such intention when the stipulation is so framed that it cannot by any possibility operate to adjust the recompense to the actual injury, a sum made payable indifferently for one breach or for many, for a breach attended with a small loss or a large one, can have no effect to liquidate damages. In case the damages are easily computed, the extent of the inequality of the provision is seen at once; but even if they are uncertain, the inequality is logically certain. Ryan, C. J., stated the [524] point with great clearness: "Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from the breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting on the rule whether the sum should be held as a penalty or as liquidated damages. On principle, we are very clear that in such a case the sum should be held as a penalty. For it appears to us that it would be as unjust to sanction a recovery of the sum agreed to be paid alike for one trivial breach, or for one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case goes upon the injustice of allowing such a recovery equally in case of damages, uncertain indeed, but manifestly and materially different in amount; equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole."<sup>1</sup> This

<sup>1</sup> Lyman v. Babcock, 40 Wis. 503. In 3 Parsons on Cont. 161, the author says: "Let us suppose a contract between parties, one of whom, for good consideration, promises to the other to do several things, and then it is agreed that the promisor shall pay, by way of liquidated damages, a large sum, if the promisee recover against him in an action for a breach of this contract. It must be supposed that this sum is intended and

[525] is believed now to be the doctrine generally held; if a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts and requiring several things to be done or omitted, it is a penalty.<sup>1</sup>

regarded as adequate compensation for the breach of the whole contract; for it is all that the promisor is to pay if he breaks the whole. It would, of course, be most unjust and oppressive to require him to pay this whole sum for violating any one of the least important items of the contract. But such would be the effect, if the words of the parties prevailed over the justice of the case. The sum to be paid would, therefore, be treated as penalty, and reduced accordingly, unless the agreement provided that it should be paid only when the whole contract was broken, or so much of it as to leave the remainder of no value; or unless the sum agreed upon was broken up into parts, and to each breach of the contract its appropriate part assigned; and the sum or sums payable came in other respects within the principles of liquidated damages." *Astley v. Weldon*, 2 B. & P. 346, per Heath, J.; *Boys v. Ancell*, 5 Bing. N. C. 390; *Reilly v. Jones*, 1 Bing. 302; *People v. Central Pacific R. Co.*, 76 Cal. 24, 36, 18 Pac. Rep. 90; *Keeble v. Keeble*, 85 Ala. 552, 5 So. Rep. 149; *Mansur & T. Implement Co. v. Tissier Arms & H. Co.* — Ala. —, 33 So. Rep. 818.

<sup>1</sup>*Iroquois Furnace Co. v. Wilkin Manuf. Co.*, 181 Ill. 582, 54 N. E. Rep. 987; *Wilhelm v. Eaves*, 21 Ore. 194, 14 L. R. A. 297, 27 Pac. Rep. 1053, citing the text; *Keck v. Bieber*, 148 Pa. 645, 33 Am. St. 846, 24 Atl. Rep. 170; *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. Rep. 286, 26 L. R. A. 114; *Krutz v. Robbins*, 12 Wash. 7, 14, 50 Am. St. 871, 40 Pac. Rep. 415; *East Moline Co. v. Weir Plow Co.*, 37 C. C. A. 62, 95 Fed. Rep. 250; *People v.*

*Central Pacific R. Co.*, 76 Cal. 24, 37, 18 Pac. Rep. 90, quoting the text; *Radloff v. Haase*, 96 Ill. App. 74, quoting the text; *El Reno v. Cullinane*, 4 Okl. 457, 46 Pac. Rep. 510; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. Rep. 91; *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. Rep. 294; *St. Louis, etc. R. Co. v. Shoemaker*, 27 Kan. 677; *Higbie v. Farr*, 28 Minn. 439, 10 N. W. Rep. 592; *Carter v. Strom*, 41 Minn. 522, 43 N. W. Rep. 394; *Dickson v. Lough*, 18 L. R. Ire. 518; *Charles Fruit Co. v. Bond*, 26 Fed. Rep. 18; *McPherson v. Robertson*, 82 Ala. 459, 2 So. Rep. 333; *Moore v. Colt*, 127 Pa. 289, 18 Atl. Rep. 8, 14 Am. St. 845; *Farrar v. Beeman*, 63 Tex. 175; *Lansing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 149; *Tayloe v. Sandiford*, 7 Wheat. 13; *Van Buren v. Digges*, 11 How. 461; *Carpenter v. Lockhart*, 1 Ind. 434; *Cook v. Finch*, 19 Minn. 407; *Lee v. Overstreet*, 44 Ga. 507; *Owens v. Hodges*, 1 McMull. 106; *Hammer v. Breidenbach*, 31 Mo. 49; *Goldsborough v. Baker*, 3 Cranch C. C. 48; *Nash v. Hermosilla*, 9 Cal. 581; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Martin v. Taylor*, 1 Wash. C. C. 1; *Henderson v. Cansler*, 65 N. C. 542; *Lord v. Gaddis*, 9 Iowa, 265; *Hallock v. Slater*, id. 599; *Brown v. Bellows*, 4 Pick. 179; *Moore v. Platte County*, 8 Mo. 467; *Jackson v. Baker*, 2 Edw. Ch. 471; *Thoroughgood v. Walker*, 2 Jones, 15; *Curry v. Larer*, 7 Pa. 470, 49 Am. Dec. 486; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Trower v. Elder*, 77 Ill. 452; *Hoagland v. Segur*, 38 N. J. L. 230; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Gower v. Saltmarsh*, 11 Mo. 271; *Watts v. Shepard*, 2 Ala. 425; *Cheddick v. Marsh*,

A distinction is taken in England where a deposit is made and it is to be forfeited for the breach of a number of stipulations of varying importance. Though some of them may be trifling or require the payment of a designated sum of money on a given day, if the contract provides for stipulated damages it will be carried out. Commenting on this rule Fry, J., said: "In that there seems to me to be great good sense, and for this reason, that if a fund is set apart to meet a particular contingency which is described, and that contingency arises, it is difficult to say that the stakeholder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency which has happened."<sup>1</sup> There are American cases which hold that where the instrument refers to a sum deposited as security for performance, the forfeiture, if reasonable in amount, will be enforced as liquidated damages, the intention being evident that the money shall be paid over upon breach of the contract.<sup>2</sup> But this rule does

21 N. J. L. 463; *Niver v. Rossman*, 18 Barb. 50; *Berry v. Wisdom*, 3 Ohio St. 241; *Clement v. Cash*, 21 N. Y. 253; *Chase v. Allen*, 13 Gray, 42; *Trustees v. Walrath*, 27 Mich. 232; *Elizabethtown, etc. R. Co. v. Geoghegan*, 9 Bush, 56; *Daily v. Litchfield*, 10 Mich. 29; *Staples v. Parker*, 41 Barb. 648; *Magee v. Lavell*, L. R. 9 C. P. 107; *Shute v. Taylor*, 5 Met. 61; *Beckham v. Drake*, 9 M. & W. 79; *Hoag v. McGinnis*, 22 Wend. 163; *Higginson v. Weld*, 14 Gray, 165; *Lea v. Whitaker*, L. R. 8 C. P. 70; *In re Newman*, 4 Ch. Div. 724; *Hooper v. Savannah & M. R. Co.*, 69 Ala. 529; *Heatwole v. Gorrell*, 35 Kan. 692; *Bryton v. Marston*, 33 Ill. App. 211.

In some of the foregoing cases the rule is quoted as applicable to agreements for performance or omission of various acts, in respect to one or more of which the damages on a breach would be readily ascertainable, because the particular case embraced such stipulations; but without any expression to indicate that the determination would have been dif-

ferent if all the damages had been of an uncertain nature.

In *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. Rep. 956 (see *Palmer v. Toms*, 96 Wis. 367, 71 N. W. Rep. 654), there was a single stipulation for a series of acts of the same nature from each of which the promisee might expect a benefit, but it was contingent, and \$200 was stipulated as damages for violation or disregard of the terms of the agreement; it was held that for a partial breach only nominal damages could be recovered in the absence of proof of substantial damages. See *McCullough v. Manning*, 132 Pa. 43, 18 Atl. Rep. 1080.

<sup>1</sup> *Wallis v. Smith*, 21 Ch. Div. 243, 250, 258; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Lea v. Whitaker*, 8 id. 70; *Magee v. Lavell*, 9 id. 107.

<sup>2</sup> *Sanford v. First Nat. Bank*, 94 Iowa, 680, 63 N. W. Rep. 459; *Maxwell v. Allen*, 78 Me. 33, 57 Am. Rep. 783, 2 Atl. Rep. 386; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. Rep. 345.

not extend to the case of a deposit made by a bidder where his bid does not refer to it as either liquidated damages or a penalty, the proposals providing simply that if the successful bidders enter into contract with bond without delay, their checks will be returned. The only implication from such language is that a failure to enter into bond shall entitle the party inviting the bids to so much of the deposit as will be a just compensation for any loss that may result from the failure of the bidder to furnish the bond. "A failure to give the bond is a breach of the contract and the damages which would result from that breach would be the difference the city paid, if anything, in excess of the amount of the unexecuted bid, and also the expense of a re-advertisement for new bids. These elements of damage are neither uncertain nor difficult of ascertainment."<sup>1</sup> This view is in accord with a New York case in which a tenant deposited with the landlord a sum of money which the lease provided should be held as security for the tenant's performance of his covenants, the same to be applied on payment of rent for the last three months of the term if the lease was not sooner terminated by the tenant's failure to perform, in which event the money was to be forfeited and become the landlord's. After default in paying one month's rent the tenant was dispossessed, and the landlord refused to pay any part of the deposit. The tenant was entitled to recover it except so much as was necessary to pay the one month's rent.<sup>2</sup> Where the agreement is that the money de-

<sup>1</sup> Willson v. Baltimore, 83 Md. 202, 213, 34 Atl. Rep. 774.

<sup>2</sup> Chaudé v. Shepard, 122 N. Y. 397, 25 N. E. Rep. 358. The opinion contains this: In view of the intention of the parties as derived from the entire provision in respect to this deposit, there was nothing within their contemplation in its purpose, in the event of the premature termination of their relation given by the lease, other than such damages as should result from the default of the plaintiff. This is evident from the fact that the deposit was made as security for performance of the

covenants and held as indemnity for such loss as should arise from breach. And in that view the plaintiff was entitled to the surplus remaining after such claim of the defendant was satisfied. Scott v. Montells, 109 N. Y. 1, 15 N. E. Rep. 729. It is, however, urged for the defendant that, as the money was actually placed in the possession of the defendant pursuant to the contract at the time of the execution of the lease, the disposition of it is governed by a different rule than that which would have been applicable if the claim to it had been founded upon

posited may be retained by the landlord as liquidated damages if the tenant is dispossessed, without any rebate or allowance, the rights of the parties are fixed by it.<sup>1</sup> But the sum paid and the value of the property exercise a potent influence in the judicial mind to the same extent as where the stipulation is not accompanied by a deposit or provision is not made that the sum paid as part of the purchase price shall become the property of the vendor if the vendee fails to perform. Where a contract for the purchase of oranges upon the trees provided for the payment of a lump sum, fifteen hundred dollars of which was paid at the time it was made, and that if the vendee did not comply with its conditions such payment was to be forfeited, the court refused to treat that sum as liquidated damages.<sup>2</sup>

There is one class of contracts in which the general construction of stipulations liquidating damages may at first sight seem to be in conflict with the doctrine stated: contracts of a negative character, requiring a party to abstain continuously from doing certain acts, as to discontinue a nuisance<sup>3</sup> or to secure enjoyment of the good will in a certain trade or business. A contract of the latter description contains a guaranty against competition from the promisor for a certain time and

the executory agreement of the plaintiff to pay it. That would have been so if the money had been paid upon the contract by way of partial performance by the plaintiff. In such case the party so paying, and afterwards by reason of his default is deprived of or denied the benefits of his contract, cannot recover the money so paid by him upon it. *Page v. McDonnell*, 55 N. Y. 299; *Lawrence v. Miller*, 86 N. Y. 131; *Havens v. Patterson*, 43 N. Y. 218. And these views are not inconsistent with the rule applied to the facts in the cases of *Ockenden v. Henly*, *Ellis, Bl. & E.* 485, and *Hinton v. Sparkes*, 3 C. P. Div. 161. There is no provision in the lease in question that the money deposited should be treated as a payment, or to make it such, unless the plaintiff's tenancy

continued to the end of the term. In that event only, it was to be applied in payment of the rent for the three months ending with its close. The provision relating to the deposit and expressive of forfeiture cannot, therefore, be treated as indicative of intention of the parties to give it the character of liquidated damages, but rather that it should have the nature of a penalty in the event there mentioned. *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. Rep. 1080, is to the same effect.

<sup>1</sup> *Longobardi v. Yuliano*, 33 N. Y. Misc. 472, 67 N. Y. Supp. 902.

<sup>2</sup> *Nichols v. Haines*, 39 C. C. A. 235, 98 Fed. Rep. 692.

<sup>3</sup> *Grasselli v. Lowden*, 11 Ohio St. 349; not to poach, *Roy v. Duke of Beaufort*, 2 Atk. 190.

at a specified place, or in some limited district. He agrees not to engage in that business for such time within that place, and if he does, or violates the contract, or fails to fulfill it, he will pay a certain sum. In general, a single violation, though [526] it be accomplished in one day, and is confined to a small part of the district, subjects him to liability for the stated sum, and a repetition of such acts, or a failure to abstain at all, may subject him to no greater liability.<sup>1</sup> These agreements are in general such as to require one continuous act of abstention, and the consideration and the amount required to be paid evince the intention that such stipulated sum be paid for a minimum of violation. The agreement may be so framed that there may be repeated recoveries for successive infractions, or so that only one infraction is possible.<sup>2</sup>

<sup>1</sup> See *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. Rep. 956, 6 L. R. A. 551.

<sup>2</sup> *Dakin v. Williams*, 17 Wend. 447; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Mott v. Mott*, 11 Barb. 127; *Streeter v. Rush*, 25 Cal. 67; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Spicer v. Hoop*, 51 Ind. 365; *Jaquith v. Hudson*, 5 Mich. 123; *Mercer v. Irving*, El. B. & E. 563; *Reynolds v. Bridge*, 6 El. & B. 528; *Sainter v. Ferguson*, 7 C. B. 716; *Muse v. Swayne*, 2 Lea, 251, 31 Am. Rep. 607; *Galsworthy v. Strutt*, 1 Ex. 659; *Rawlinson v. Clarke*, 14 M. & W. 187.

It is held in Kansas that contracts not to engage in business must be sued upon as breaches thereof occur. *Heatwole v. Gorrell*, 35 Kan. 692. But this is not in accord with the weight of authority. *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445; *Grasselli v. Lowden*, 11 Ohio St. 349; *Moore v. Colt*, 127 Pa. 289, 18 Atl. Rep. 8 14 Am. St. 845. See *Leary v. Laffin*, 101 Mass. 334.

Under a statute of New York a contract was authorized to be made with certain officers for the publication of the reports of the decisions of the court of appeals. The officers were given power to impose terms

beneficial to the public on the contracting publisher, and to make provision in the contract that a party injured by the refusal of the contractor to sell and deliver as prescribed in the contract should be entitled to recover damages, and might fix a sum as liquidated damages. A contract so entered into required the contractor to furnish, at the contract price, any volume published under it to any other law-book seller in the city of New York or Albany applying therefor, "in quantities not exceeding one hundred copies to each applicant," unless the contractor choose to deliver more. The contract also provided that for any failure on the part of the contractor "to keep on sale, furnish and deliver the volumes, or any of them, as agreed, he shall forfeit and pay . . . the sum of \$100, hereby fixed and agreed upon, not as penalty, but as liquidated damages," to be sued for and recovered by the persons aggrieved. The plaintiff, a bookseller, applied on six different occasions for a number of copies required by him in his business, of certain volumes published under the contract, tendering the contract price, which defendant

Where the stated sum obviously and grossly exceeds [527] any just measure of compensation there is the same recognized discretion in such cases as in others to declare it a penalty.<sup>1</sup>

refused to deliver. In an action on the contract it was held a valid stipulation of damages, not a penalty, and that the plaintiff was entitled to recover the damages for each refusal. Miller, J., delivering the opinion of the court, treats the question as one depending on the intention of the parties, ascertained from the language of the contract and from the nature of the surrounding circumstances of the case. Referring to the case he says: "The breach provided for was a single one—a failure to keep on sale, furnish and deliver the volumes named at a price fixed. The agreement expressly provides that the sum named is fixed and agreed upon 'not as a penalty.' The failure to sell and deliver embraced not only a single volume, but might be one hundred volumes at one time. The damages for a failure to deliver a single volume might be very small, while for a larger number it would be far greater; and, in case of a bookseller, disposing of them in the course of his trade, might be beyond the amount actually fixed. The damages for a single breach were also uncertain, and could not be determined without extrinsic evidence, and without some embarrassment. The mere loss of profits on a volume to a bookseller might also be of but trifling amount when compared with the injury to his trade by being unable to furnish to his customers volumes of the reports as required. Under the circumstances it is easy to see that there would be considerable difficulty in making proof of the actual damages incurred. In view of the facts, although the question is by no means free from embarrassment, it is, per-

haps, a fair inference that the parties actually intended to guard against these difficulties by fixing the amount named in the contract as liquidated damages. As the damages which might possibly be incurred by a failure to supply a larger number of copies provided for by the contract might be greater, we think the amount was not unreasonable, or grossly disproportionate to the probable estimate of actual damages." *Little v. Banks*, 85 N. Y. 258.

<sup>1</sup> *Wheatland v. Taylor*, 29 Hun, 70; *Burrill v. Daggett*, 77 Me. 545; *Smith v. Wedgwood*, 74 id. 457; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Grant v. Pratt*, 52 App. Div. 540, 549, 65 N. Y. Supp. 486.

In *Perkins v. Lyman*, 9 Mass. 522, 11 id. 76, 6 Am. Dec. 158, the defendant covenanted for a valuable consideration that he would not be directly or indirectly interested in any voyage to the northwest coast of America or in any traffic with the natives of that coast for seven years, in the penal sum of \$8,000. It was held a violation of such covenant to own and fit a vessel for such voyage, although before her departure the covenantor divested himself of all interest in the vessel and cargo; but also held that the \$8,000 was penalty. "The question whether a sum of money mentioned in an agreement shall be considered as a penalty and so subject to the chancery powers of this court or as damages liquidated by the parties is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract, provable in a written instrument, arises, the court may take some aid to themselves from circumstances extrane-

**§ 296. Effect of part performance accepted where damages liquidated.** For the same reason that one sum cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance.<sup>1</sup> In case of such a stipulation the

ous to the writing. In order to determine upon the words used there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as to other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." The court considered there was nothing in the transaction and subject-matter to indicate whether the sum stated was penalty or liquidated damages. It might be either consistently with the object of the contract. But the court say: "If the sum of \$8,000, mentioned in the agreement, is to be treated as liquidated damages, then for one instance, in which the contract should be broken, and for a thousand in which the defendant should interfere in the trade contemplated by the parties to be secured to the plaintiffs for seven years, exclusively of him and of all acting under him, the same damages, the amount of demand, would be recovered, and having been once paid, if demanded as a penalty, there would be an end of the contract; but if demanded as damages, then, it seems, the demand might be repeated. Examined in this view we see nothing which gives this contract any other determinate meaning than that of penalty. If there is nothing to prevent the plaintiffs, in case the defendant should have injured them in the breach of his contract to a greater amount than \$8,000 from recovering upon his covenant, and in that form of action, the extent of

the damage actually sustained, although greatly exceeding the sum mentioned, it would be a severe construction, indeed, which should consider him liable to that amount upon one breach, however slight the injury and loss may have been. . . . He binds himself in the sum of \$8,000 for his faithfully and strictly adhering to this contract. It is not said, if he does so, contrary to his agreement, then he will pay that sum as a satisfaction. Nor is there anything expressed which would conclude the plaintiffs, unless it be their form of action (debt), when the amount of damages should exceed \$8,000, from demanding to the extent of their loss."

<sup>1</sup> *Hoagland v. Segur*, 38 N. J. L. 230; *Shute v. Taylor*, 5 Met. 61; *Taylor v. The Marcella*, 1 Woods, 302; *Watts v. Sheppard*, 2 Ala. 425; *Berry v. Wisdom*, 3 Ohio St. 241; *Lampman v. Cochran*, 16 N. Y. 275, per *Shankland, J.*; *Sheill v. McNitt*, 9 Paige, 101; *Mundy v. Culver*, 18 Barb. 336; *Smith Granite Co. v. Newall*, 22 R. I. 295, 47 Atl. Rep. 597. The text is approved in *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154, 165, 22 Pac. Rep. 492. In the last case the contract was for the sale and purchase of cattle, and stipulated that a sum should be paid if the vendor failed to deliver the entire number called for; no provision was made for the delivery of a less number. Less than the whole were delivered and accepted. As a result the agreement for stipulated damages was converted into one in the nature of a penalty.



stated sum is only recoverable upon the happening of the very event mentioned in the contract. If a partial breach occurs it has sometimes been said the stated sum is as to that breach only penalty, and damages are given on proof without regard to it.<sup>1</sup> In other instances it has been held that the damages for a partial breach are a constituent of the sum stipulated for an entire failure to perform. Thus, where there were liquidated damages for a failure to convey land, and a part only of it was conveyed, and a failure as to the residue, the damage allowed was a sum which bore the same ratio to the stipulated sum that the value of the land not conveyed bore to that of the whole.<sup>2</sup> If the owner of the building, with the consent of the contractor, who has bound himself to pay \$10 per day as liquidated damages for delay in completing it, occupies a part of the building after the time stipulated for its completion, but before it is finished, the liability for the stipulated sum terminates with such occupancy; thereafter the contractor is only liable for the actual damages.<sup>3</sup>

**§ 297. Liquidated damages are in lieu of performance.** It has been held that in all cases where a party relies [529] on the payment of liquidated damages it must clearly appear from the contract that they are to be paid and received in lieu of performance.<sup>4</sup> Where the stipulated sum covers the loss of the whole contract, and does not apply where there is merely

<sup>1</sup> *Wheatland v. Taylor*, 29 Hun, 70; *Shute v. Taylor*, 5 Met. 61.

<sup>2</sup> *Watts v. Sheppard*, 2 Ala. 425. See *Chase v. Allen*, 13 Gray, 42.

The sum named must be regarded as liquidated as to all the provisions to which it shall extend, or it will not be so regarded as to any. It cannot be liquidated damages in one case and not in the other. If the contract applies to the covenant of one party to convey, and to that of the other party to pay the consideration money on the delivery of the deed, the measure of damages in one case is the unpaid purchase-money, which can be ascertained, and as to that covenant it cannot be considered liquidated damages, and if not

liquidated as to that covenant it is not as to the other. *Lansing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 149, 156; *Laurea v. Bernauer*, 33 Hun, 307.

If the requests and acts of one in whose favor damages are stipulated are responsible for part of the delay in the execution of a building contract, there cannot be an apportionment of the stipulated sum. *Willis v. Webster*, 1 App. Div. 301, 37 N. Y. Supp. 354.

<sup>3</sup> *Collier v. Betterton*, 87 Tex. 440, 29 S. W. Rep. 467.

<sup>4</sup> *Gray v. Crosby*, 18 Johns. 219; *Winch v. Mutual Benefit Ice Co.*, 9 Daly, 177.

a violation of some detail of it, they are in lieu of the performance of the entire contract; they satisfy the whole and every particular of it. Thus, if in an agreement for submission of a controversy to arbitration it is mutually agreed that either party failing to fulfill it shall pay to the other a specified sum as stated damages, not so large in itself as to imply a penalty, it would be recoverable from the party who should revoke the power of the arbitrators, for he would thereby repudiate the submission and defeat the entire object of the agreement. But if there be no revocation, and after an award is made one party refuses to perform it, the refusal is not such a breach as the stated sum applies to.<sup>1</sup> And if such sum is

<sup>1</sup>Id. In *Lowe v. Nolte*, 16 Ill. 475, an action was brought on an award. The submission stated that several suits were pending between the parties, arising out of a contract in relation to the purchase of grain; and it was agreed that all matters connected with the contract and the suits were to be referred; that the decision be conclusive, and that judgment, on ten days' notice, should be entered on the award. It was also provided that the submission should not operate to dismiss any of the pending suits until final judgment on the award, or the performance of it; the parties binding themselves to abide by the award "in the penalty of \$1,000 as stipulated damages, to be paid by the party delinquent to the party complying." The award was for \$5,876.46. Scates, C. J. (speaking of causes of demurrer to the declaration), said: "The most important is the want of an averment of a failure to pay the liquidated damages, stipulated to be \$1,000, for non-compliance with the award, and which it is here contended is all that can be recovered under the submission and award. If this view is sustainable no action will lie upon the award as it is here brought, but alone upon the submission. To solve this objection it is necessary to ascertain, from the

nature of the matters in controversy and the terms and language of the parties in their submission, whether they intended by this part of the agreement that the \$1,000 fixed as liquidated damages should be strictly and technically so held, or only as a penalty. Courts have not been confined and controlled alone by the literal terms, stipulated damages, used by the parties, when inquiring into their true intention and meaning; but they have looked to the subject-matter of the dispute, the situation and condition of the parties, and all the circumstances, together with the effects and consequences, as aids in arriving at the true meaning. Where a covenant is made concerning an existing cause of action, that cause may or may not be merged in the covenant. If it be merged, and the covenant be broken, the party is liable alone on the covenant, and not on the original cause of action. If it is not merged, then the covenant affords a new and additional cause of action and remedy upon it. In this latter case, if the amount named in the covenant or agreement be fixed as liquidated or stipulated damages, and is *intended* by the parties to be paid in lieu of performance, then the recovery will be confined to that amount for the breach, as well as to

made payable as liquidated damages for a breach of [530] some particular only of the agreement, then it may still be a question whether that feature of the contract will, notwithstanding the breach, and the claim or even payment of those damages, be of continuing obligation so as to admit of other breaches and successive claims and recoveries of the same stipulated damages. This question is not to be settled by any rule peculiar to the construction of such stipulations; it depends on the intention of the parties as ascertained by a fair interpretation of the contract. Where certain work is required to be done within a specified time it may be, and often is, agreed that a stated sum shall be paid for every week, month or other period during which its completion is delayed beyond that time. In such cases there is, by necessary implication, a continuing obligation as well as right to finish the work, though the stipulated time of performance has elapsed. These sums are recoverable and may be aggregated;<sup>1</sup> and they are severally payable only as complete satisfaction for the delay of performance and not in lieu of it.

§ 298. **Effect of stipulation upon right of action.** It is not the effect of the ordinary contract which stipulates for damages to constitute the person who claims the benefit of the stipulation a tribunal to determine his rights thereunder. Hence, where a contractor has not performed according to his agreement the contractee may sue for the sum which the other has agreed shall be the damages;<sup>2</sup> and where the amount is to be deducted from the payment last due, if such deduction has been made, the fact may be shown in bar of the action.<sup>3</sup> A plaintiff who elects to take liquidated damages cannot have an injunction; he may elect between the two remedies, but cannot have both.<sup>4</sup> If it is not apparent that the

his action on the covenant or agreement for his remedy, and cannot preserve his original cause of action. But when such intention does not appear, the sum named as stipulated or liquidated damages will be received and treated as a penalty; and the party may recover upon the original cause."

<sup>1</sup> Fletcher v. Dyche, 2 T. R. 32; Pettis v. Bloomer, 21 How. Pr. 317; Hall

v. Crowley, 5 Allen, 304, 81 Am. Dec. 745. See § 291; Weeks v. Little, 47 N. Y. Super. Ct. 1.

<sup>2</sup> Mitchell v. McKinnon, 65 Mich. 683, 32 N. W. Rep. 895; Lea v. Whitaker, L. R. 8 C. P. 70.

<sup>3</sup> Mitchell v. McKinnon, *supra*; Stillwell v. Temple, 28 Mo. 156.

<sup>4</sup> General Accident Assurance Co. v. Noel, [1902] 1 K. B. 377.

payment of the stipulated sum is to be made as an alternative in lieu of strict performance, equity will enjoin the defendant from breaching his covenant.<sup>1</sup>

§ 299. **Waiver of right to stipulated damages.** If part performance of an entire contract is accepted a stipulation concerning the damages is waived.<sup>2</sup> The waiver of the right to annul a building contract waives a claim to stipulated damages for either non-performance or delay by the contractors, in the absence of an express agreement to the contrary.<sup>3</sup> There is no waiver of the right to such damages on the ground of part performance where the obligee performs for and at the request of the obligor; no consent that an existing breach shall be disregarded can be implied from the obligee's act.<sup>4</sup> Where it is provided that a sum shall be deducted from the contract price for the performance of work for each week's delay beyond a time fixed, the right thereto is not waived because the amount is not deducted from the monthly estimates or claimed from month to month, if the contract is silent as to the time when the claim shall be asserted.<sup>5</sup> If the defendant's right to retain the money which has been agreed upon as stipulated damages depends upon the failure of the plaintiff to perform and the termination of the contract for that reason, the fact that the contract is ended by consent does not waive the right to the damages.<sup>6</sup> But such damages cannot be recovered if the delay in the performance of a building contract is owing to the failure of the person for whom the building is being erected to perform a condition precedent.<sup>7</sup> If such a contract provides for the completion of the building

<sup>1</sup> *Davies v. Daniels*, 8 Hawaii, 88.

<sup>2</sup> *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154, 22 Pac. Rep. 492.

<sup>3</sup> *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 331, 11 S. W. Rep. 18, 11 Ky. L. Rep. 146; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S. W. Rep. 251.

<sup>4</sup> *Parr v. Greenbush*, 42 Hun, 232.

<sup>5</sup> *Texas, etc. R. Co. v. Rust*, 19 Fed. Rep. 239, 245.

<sup>6</sup> *Wolf v. Des Moines R. Co.*, 64 Iowa, 380, 20 N. W. Rep. 481.

<sup>7</sup> *Long v. Pierce County*, 22 Wash.

330, 348, 61 Pac. Rep. 142; *Eldridge v. Fuhr*, 59 Mo. App. 46; *Standard Gaslight Co. v. Wood*, 9 C. C. A. 362, 61 Fed. Rep. 74; *Kerr Engine Co. v. French River Tug Co.*, 21 Ont. App. 160. See *Starr v. Gregory Consolidated Mining Co.*, 6 Mont. 485, 13 Pac. Rep. 195; *King Iron Bridge & Manuf. Co. v. St. Louis*, 43 Fed. Rep. 768, 10 L. R. A. 826; *Ortmann v. First Nat. Bank*, 49 Mich. 56, 12 N. W. Rep. 907; *Dannat v. Fuller*, 120 N. Y. 554, 24 N. E. Rep. 815.

by a day designated, and, in default, that the contractor shall pay liquidated damages, and, further, that other work may be ordered in addition to that expressly provided for, and such work is ordered with the necessary result that the completion of the building is delayed, the contractor is not liable for the liquidated damages unless he has agreed that, whatever additional work may be ordered, he will complete the whole within the specified time.<sup>1</sup> And where the delay in the performance is caused by the default of both parties, and the damages cannot be apportioned, the stipulation for compensation cannot be enforced.<sup>2</sup>

<sup>1</sup> *Dodd v. Churton*, [1897] 1 Q. B. 562; *Holmes v. Guppy*, 3 M. & W. 387; *Westwood v. Secretary of State for India*, 11 Week. Rep. 261, 7 L. T. 736. *Jones v. St. John's College*, L. R. 6 Q. B. 115, was distinguished on the ground that the court had no oppor-

tunity to construe the contract, the allegation that the builder had entered into the contract pleaded being admitted by the demurrer.

<sup>2</sup> *Champlain Const. Co. v. O'Brien*, 117 Fed. Rep. 271.













